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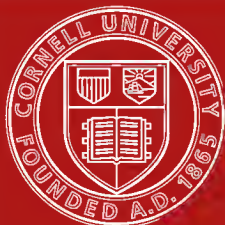
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THE PRINCIPLES OF EQUITY AND EQUITY PLEADING

BY

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PREFACE.

THE lectures which compose this book were delivered by Mr. Merwin at the Law School of Boston University. They were written out in his own hand, and revised by him from year to year, and I have made in them only such slight verbal changes as he would have made with a view to publication; but much new matter has been added in the form of notes. The author drew his illustrations chiefly, though by no means exclusively, from the English Courts, from the Federal Courts, and from the Supreme Court of Massachusetts. By way of making the book more convenient and valuable for use in all parts of the country, other authorities, taken from the various state courts are cited; and, where the subject seemed to require it, the text has been amplified and illustrated in the notes. The result is a short, but complete treatise, which, I trust, will prove useful both to practitioner and student. The notes added by the editors are inclosed in brackets. My thanks are due to Professor A. H. Wellman for his advice and assistance, and more especially to Charles Hiller Innes, Esq., of the Boston Bar, by whom the bulk of the work has been done.

Here, perhaps, this preface ought to end; but I cannot forbear adding one remark of a biographical nature. Mr. Merwin had a diversified practice, and he was a diligent student of the law in all its branches; but for Equity he had a peculiar liking and aptitude, because it especially appealed

to that sense of justice which was inherent and all-prevailing in his character. In an address which he delivered at a meeting of the bar held after the death of Judge Curtis, Mr. Merwin said: "Some men we honor for the prompt indignation with which they would repel and rebuke a dishonest suggestion. Others there are, and have been, to whom it is impossible that such a suggestion could be made; Judge Curtis, I think, was one of these. The wonderful precision and accuracy of his mental operations, I cannot but believe, were due in a large measure to the singular rectitude and force of his character. No baser metal thwarted its action or caused the magnet to deviate from the pole." The same remark would apply with equal strength to my Father himself, and something of the spirit which it describes will, I think, be found in the volume now offered to the profession.

H. C. MERWIN.

April, 1895

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PRINCIPLES OF EQUITY.

CHAPTER I.

INTRODUCTORY.

1. THE subject which we are to consider is Equity Jurisprudence, its Pleadings and Practice. It has a twofold interest. To a student of the science of the law, no other department of it, I think, presents such an attractive and fruitful field of inquiry; and to the practising lawyer it is a matter of daily and ever increasing importance.

There are very few, if any, States of the Union where Courts of Chancery do not now exist, or where this peculiar jurisprudence is not in some form administered. The courts of the United States, from the origin of the federal government, have been invested with full equity powers; and in many of the States where this jurisdiction formerly existed only to a very limited degree, or not at all, it has now been conferred to the fullest extent. Of this, Massachusetts is an instance. The Circuit Courts and the Supreme Court of the United States are the best existing representatives of the complete chancery system. They each have full equity jurisdiction (the Supreme Court by appeal) and the original forms of procedure are substantially preserved. Even in England very radical changes in chancery practice have been introduced by special statutes, and the same is true of Massachusetts and of many other States of the Union.

2. But in the federal courts chancery jurisprudence and practice are substantially retained in their integrity; and therefore no student who aspires to practise in the most important courts of the country should fail to equip himself thoroughly in this branch of their jurisdiction. And this

jurisdiction will probably be permanent. The Constitution of the United States vests the judicial power of the United States in one Supreme Court and in such inferior courts as Congress may from time to time establish; and it provides that this judicial power shall extend to all cases "in Law and Equity" arising under the Constitution and Laws of the United States, or between the parties therein designated. (art. III., sec. 1, 2.) Nothing, therefore, short of a change in the Constitution itself can deprive the federal courts of jurisdiction in equity.

3. In the early history of the country a strong prejudice existed in some of the States against Courts of Chancery. This was undoubtedly due, in part at least, to the jealousy which was not unnaturally felt at that time of any system of law from which trial by jury was excluded. But experience has vindicated, even to its opponents, the value and importance of equity jurisdiction. It has become a necessity of our modern civilization. Owing to the growth and development of the country, the introduction of railroads, the multiplication of corporations (by means of which a large part of the business of the world is now carried on), the increase in manufactures and commerce, and the infinite variety of business relations growing out of this state of things, multitudes of cases are daily arising which the common law, with its rigid forms and narrow system of remedies, is utterly unable to cope with. These cases would practicably be remediless except for the relief found in the more flexible methods and more comprehensive justice of a Court of Chancery.

The popularity of Courts of Chancery at the present day is, I apprehend, in a measure due to that very feature which formerly rendered them unpopular, namely, the absence of trial by jury. Men have begun to doubt the infallibility of juries; and, whatever may be the reason, the fact is that lawyers and clients, — especially in important commercial cases, or cases where neither party can hope to gain from the passions or prejudices of the jury, are glad to exchange the modern material of the jury-box for an impartial and experienced judge.

What is Equity?

4. This term may be misleading. Equity in its popular sense signifies whatever is right and just between man and man. But no system of law has ever undertaken to accomplish all that. There are many duties and obligations continually arising with which neither courts nor legislatures can deal, and which must be left to the forum of conscience.

The term "equity," as employed in legal phraseology, has a technical and arbitrary sense; it means that system of jurisprudence which was originally administered by the High Court of Chancery in England, and which is now administered by the courts of this country that have full chancery jurisdiction.

5. It is a system. This is an important word in my definition. The growth of many centuries, it has developed into a comprehensive and symmetrical system of well-established principles by which its decisions are governed. Lord Mansfield, the great chief justice and expounder of the common law, declared it to be "a noble, rational, and uniform system of law."

It is a grave error to suppose that any judge in chancery is at liberty to decide any case according to his own peculiar notions of what may be right or fair under the circumstances, uncontrolled by established principles. If this were so, if every case in chancery were at the mercy or discretion of the judge, then indeed the sarcasm in which Selden indulged about courts of chancery would be well founded, for he said, "The measure of justice in a given case is more or less according to the size of the Lord Chancellor's foot."

But this is not so. As was well said by Lord Redesdale, "The cases which occur are various, but they are decided on fixed principles. Courts of equity have in this respect no more discretionary power than courts of law. They decide new cases, as they arise, by the principles on which former cases have been decided, and may thus illustrate or enlarge the operation of those principles; but the principles are as

fixed and certain as the principles on which the courts of common law proceed.”¹

6. The question, however, remains, What is equity jurisprudence, in what does it consist? It is impossible to answer this question by a definition. Definitions have often been attempted. The text-books are full of them; but, so far as I can judge, they are deficient, and therefore misleading. Lord Bacon, in his address upon assuming the office of Lord Chancellor, used this language, which is often quoted: “Chancery is ordained to supply the law, and not to subvert the law.” This is a well-sounding antithesis, but we are not much the wiser for it until we are told in what particulars and by what means chancery supplies the deficiencies of the common law. The broad statement, that chancery supplies whatever is deficient in the common law, is confessedly incorrect.

I know of no way in which the question can be answered, so that the answer shall be instructive and accurate, except by an enumeration and exposition of the leading subjects within the jurisdiction of chancery, and of its methods of redress and relief, and that will be the aim of these lectures. Before proceeding to consider the subject in detail, a few preliminary observations may be useful as to the structure of a court of chancery, the general scope of its jurisdiction, and the particulars in which it most broadly differs from a court of common law. These may help us to attain a general notion of what a court of chancery is, and what sort of cases it undertakes to deal with.

Structure and Methods of Courts of Chancery.

7. At the common law the distinguishing feature in the administration of justice is trial by jury. As a general rule, all questions of fact under that system are tried before a jury of twelve men, and their verdict upon the issue submitted to them is conclusive upon the parties. A judge presides over all trials at common law, but his function is to rule upon questions of law as they may arise in the case, and, at the conclusion of the evidence and of the argu-

¹ Bond v. Hopkins, 1 Sch. & Lef. 413, 428.

ments of counsel, to instruct the jury concerning the law applicable to the questions raised in the case. In coming to a verdict it is the duty of the jury to obey these directions of the judge as to the law; but upon all questions of fact it is their province and duty to decide for themselves, independently of any suggestions or expressions of opinion by the judge. Formerly it was not unusual for judges to give their own impressions as to the evidence in a very distinct manner, and juries were treated almost as contumacious if they did not accept the suggestions of the judge; and in England even at the present day this custom is more or less followed. But in this country the right of juries to judge of the facts, untrammelled by any opinions or suggestions of the bench, has always been more tenderly respected, and now by express legislation in many of the States (Massachusetts¹ included), judges are prohibited from giving any opinion, or "charging," upon the facts.

8. It is well settled, however, that in the courts of the United States a judge in submitting a case to the jury "may in his discretion express his opinion upon the facts, and that when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, such expressions of opinion are not reviewable on writ of error."²

9. In certain cases, where a verdict is so obviously against the weight of the evidence that the only reasonable inference is that the jury acted under some gross mistake, or misapprehension, or disregard of duty, a power is, and always has been, reserved to courts of common law to set aside the verdict as being against the evidence. But in this case the power of the court goes only so far as to set the verdict aside and to order a new trial. The judge cannot himself render a verdict because he may be dissatisfied with the verdict of the jury. At common law, trial by jury is the sole mode of settling disputed questions of fact.

10. In equity there is no trial by jury, and as a general rule a jury constitutes no part of its machinery. All questions

¹ Pub. Stats. ch. 153, § 5.

93; *Lovejoy v. United States*, 128

² *Rucker v. Wheeler*, 127 U. S. 35, U. S. 171.

of fact as well as of law are ordinarily decided by the chancellor. He is both judge and jury.

The chancellor, however, has always had the right, in his discretion, when a question of fact arose before him, to send it for trial before a jury in one of the common-law courts. This has rarely been done, and only under peculiar circumstances, as where from the nature of the case, or from the character of the testimony to be introduced, it was clear that the question could be tried more satisfactorily by a jury in a court of law than by the chancellor. When this course is followed, the verdict of the jury is reported to the chancellor, but it is not binding upon his conscience; and unless he is satisfied that it is according to the evidence in the case, and just, he will disregard it. And this has not infrequently been done.¹

11. The same proceeding is now in vogue in this country in the United States courts, and more or less in the state courts,² as, for instance, in those of Massachusetts. It is provided by statute³ in Massachusetts "that the court may frame issues of fact to be tried by a jury in an equity cause, when requested by a party, and direct the same to be tried in the county where such cause is pending, at the bar of the Supreme Judicial Court or the Superior Court."

12. But it is important to remember that the sending of any issue of fact in an equity cause for trial by a jury is solely a matter of discretion with the court; it is not the absolute right of either party.⁴ This has always so been held in England, and the law is well settled to the same effect in the courts of the United States and of Massachusetts.

13. It has been doubted, even by some members of the profession, whether this rule is consistent with the constitutional

¹ [Sheffield v. Mulgrave, 2 Ves. 387; Apthorp v. Comstock, 2 Paige, Jr. 426; Kohn v. McNulta, 147 U. 482.]

S. 238; Brundage v. Deschler, 131 Ind. 174; Metcalf v. Metcalf, 85 Me. 473.]

³ Pub. Stats. ch. 151, § 27.

² [Trenton Banking Co. v. Woodruff, 2 N. J. Eq. 117; Dexter v. Providence Aqueduct Co. 1 Story,

⁴ [Le Guen v. Gouverneur, 1 Johns. Cas. 436; Short v. Lee, 2 Jac. & W. 464; Miller v. Wack, 1 N. J. Eq. 204.]

right of trial by jury. But such doubts have arisen from a superficial reading both of the United States and the Massachusetts Constitution.

Article VII. of Amendments to the United States Constitution secured the right of trial by jury "in suits at common law" only. In two very important classes of suits in United States courts, the right of trial by jury does not exist, namely, suits in equity and in admiralty.¹ By the laws of the United States exclusive jurisdiction in admiralty suits is vested in the Federal courts.

14. The Massachusetts Constitution and the Declaration of Rights employ a little more circumlocution in their language, but it comes to the same thing. In *Stockbridge Iron Company v. Hudson Iron Company*² counsel argued that it was the constitutional right of each party to have issues of fact tried by a jury, but the court rightly held otherwise; and to the same effect is the succeeding case of *Ross v. New England Mutual Insurance Company*.³

15. The Massachusetts Declaration of Rights (art. 15) provides "that in all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherways used and practised, the parties have a right to trial by jury;" and under this provision it was argued, in the cases just cited, that the plaintiff had a right to a trial by jury. But it is clear that the framers of the Massachusetts Declaration of Rights and of the Constitution were dealing with the law of England as it existed at that time, which had become the law of this land as a part of our national inheritance. When, therefore, it was provided that the right to a trial by jury should exist, "except in cases in which it has heretofore been otherways used and practised," it is clear that the exception intended was the well known exception prevailing in all controversies in equity from the earliest times. In other words, the Constitution intended to secure to the citizens of Massachusetts the old common-law right of trial

¹ Article 3, § 2 of U. S. Constitution; *Goodyear v. Day*, 2 Wall. C. C. Rep. 283.

² 102 Mass. 45.

³ 120 Mass. 113.

by jury, and did not intend to extend that right to those cases "in which it had been otherways used and practised" in courts of chancery.

16. The first peculiarity, then, of a court of chancery, and the first great distinction between it and a court of common law, is that in the former no party has a right to a trial by jury, and that, as an almost universal rule, all questions of fact, as well as of law, are determined by the chancellor.

But here comes in an important qualification. The exception is of those "cases in which it has heretofore been otherways used and practised." Whenever the jurisdiction of a court of equity has subsequently been extended by statute to a case or cases over which equity jurisdiction as exercised in England did not exist at the time when the Constitution was adopted, the right to a trial by jury still exists in such cases, although jurisdiction over these cases has been transferred by statute from courts of law to courts of equity. In other words, the standard to which we are to refer is the jurisdiction of the English court of chancery as it existed at the time when our Constitution was adopted. If the subject was then within the jurisdiction of a court of chancery, the right of trial by jury does not now exist in regard to it. But where the equity jurisdiction has, since that time, been created by statute in this country, as regards such cases the right of trial by jury still obtains.¹ This was decided in Massachusetts in the recent case of *Powers v. Raymond*.²

Modes of Procedure.

17. The second general distinction consists in the modes of procedure in equity.

Equity pleading and practice will be subjects for subsequent careful consideration. It is enough for the present purpose to say that a suit in equity is begun by a bill or petition addressed to the chancellor, stating the case and asking for the appropriate relief. Upon the filing of the

¹ [Mississippi Mills v. Cohn, 150 U. S. 202.] ² 137 Mass. 483.

bill, a subpoena or summons is issued to the defendant calling upon him to appear and make answer. As a general rule, the defendant's answer must be under oath. (Modern practice has introduced many changes which will be noticed hereafter.) The defendant may file a plea or a demurrer. If he does not, he must answer fully. Then follows a general replication by the plaintiff, and the cause is at issue. The testimony is next taken, theoretically by depositions exclusively, and the cause is then heard and determined by the judge.

Structure of the Court.

18. We derive our system of equity from the High Court of Chancery of England, except so far as the practice of that court has been modified by legislation in this country. The decisions of that court made prior to the Declaration of Independence have the authority of precedents; and although its decisions subsequently made are not strictly binding upon our courts, they are nevertheless very properly considered as of the highest value as expositions of the law.¹ The Supreme Court of the United States in its ninetieth equity rule has also made the practice of the High Court of Chancery of England the guide in all matters of practice not specially provided for by its own rules. It is therefore important both for the student and the practitioner to be familiar with the original and present constitution of the courts of chancery in England, in order that they may attach to the decisions of those courts their proper relative value.

19. Originally the Lord Chancellor was the only judge sitting in the Court of Chancery. It is a very ancient office, dating back certainly as early as the Norman Conquest. As the keeper of the king's conscience, such matters as were not remediable in the courts of common law were presented by bill or petition to the chancellor for relief, and thus originated and grew up the system of equity jurisprudence. The Lord Chancellor is in one sense a political officer. He is not appointed for life or during good behavior, as other

¹ [Southern National Bank v. Darling, 49 N. J. Eq. 398.]

judges are, but only during the pleasure of the sovereign. He is a member of the Cabinet, and as a matter of practice always resigns upon a change of ministry.

20. Next in order of time as well as of rank came the Master of the Rolls. This office was established in the reign of Edward I., and its duties at first were mainly clerical. But very soon judicial duties, in aid of the Lord Chancellor, were added to the office, and in process of time the Master of the Rolls became an officer of great dignity and importance. Several of the ablest judges who have ever presided in the courts of Great Britain have been Masters of the Rolls. Sir William Grant and Sir George Jessel are illustrious examples. The office is still preserved, and the Master of the Rolls ranks next to the Lord Chancellor.

With the increase of business a Vice-Chancellor was next added to the judicial force of the Court of Chancery, and the number of Vice-Chancellors was finally increased to four. From the decisions of the Vice-Chancellor as well as from those of the Master of the Rolls, an appeal lay to the Chancellor.

21. About the year 1850, the amount of business in his court and the pressure of the political duties of the Lord Chancellor had become so great that a new court of appeal was created for the purpose of relieving the Lord Chancellor, in some degree, of his judicial duties. It originally consisted of judges who were denominated the Lords Justices of the Court of Appeal; and appeals lay to them from the decisions of the Master of the Rolls and of the Vice-Chancellors.

22. More recently, by the Supreme Court of Judicature Act of August 5, 1873,¹ several important changes were made in the judicial system of England. The office or rather the name of Vice-Chancellor was then abolished, and the courts of chancery are now constituted as follows:—

The Lord Chancellor; the Lords Justices of the Court of Appeal, five in number, besides the Master of the Rolls, who is a member of this court, and who, when he sits, is the presiding judge, except of course when the Lord Chancellor is present; six Justices of the High Court attached to the

¹ 36 & 37 Vic. ch. 66.

Chancery Division. These judges are now called justices, instead of vice-chancellors as of old. They also, I believe, have other duties on the circuit, such as the trial of causes in common-law courts.

23. There is a right of appeal: 1. From the justices (or vice-chancellors) to the Lords Justices of the Court of Appeal; 2. From the Lords Justices, or from the Lord Chancellor to the House of Lords. An appeal from the Lord Chancellor to the House of Lords has always existed in certain cases, regulated by statute. The House of Lords has always been and is still the supreme court of appeal. It practically consists of the law lords, *i. e.* the Lord Chancellor, any ex-Lord Chancellor, and other judges who have been distinguished by a peerage. Thus, Baron Parke was created a peer, with the title of Lord Wensleydale, because his services were required in the House of Lords, and as a reward for his distinguished judicial labors. More recently Mr. Justice Blackburn (the author of *Blackburn on Sales*) was raised to the peerage, principally, I presume, for the sake of his services as a law lord.

24. The House of Lords is, of course, composed of all the members of the peerage, including laymen and the spiritual lords, *i. e.* the bishops, as well as the law lords. But in practice, only the law lords proper sit or participate in the decisions of appeals. It would be an anomaly which might convulse the kingdom if any lay lords should attempt to vote upon or control the decision of such an appeal. I find but one case in which a lay lord has taken an active part in speaking or voting on an appeal, and that is the *Fermoy Peerage Case*,¹ in which Lord Derby spoke and gave opinion. The question there was one of construction under the Act of Union of Great Britain and Ireland. In form, the decision is always rendered by vote of the lords, and it is entered upon the journals like any other vote.

25. Turning to this country, I shall mention only two illustrations, — the circuit courts of the United States, and the Supreme Judicial Court of Massachusetts. Each has complete equity jurisdiction, but neither has a judge whose

¹ 5 House Lords Cases, 716, 789.

sole function is to sit as a chancery judge or chancellor. And yet the two systems are maintained as distinct as if administered by different officers. The circuit courts of the United States are courts both of original common law and of equity jurisdiction. When a suit in equity comes before the judge it is conducted and decided strictly according to chancery proceedings, and as if that were the sole jurisdiction which he exercised. The next day he may be presiding in trials before a jury at common law, or hearing appeals from the United States District Court in Admiralty,¹ but for the time being he is a chancellor.

26. The distinction between law and equity is rigidly adhered to in the Federal courts.² Whenever a case is removed from a state court to a United States circuit court, it must thereafter be conducted and tried strictly according to its true character, either as a case at law or in equity.³ In some of the States, all distinction between the two has been obliterated, and every description of suit is allowed to be brought by bill or petition, and to proceed as a suit in equity. But upon the removal of such a case to the United States court, it must proceed "after its kind," according to the true distinction between law and equity.⁴ Equitable defences are not allowed to actions at law in United States courts.⁵

27. The Supreme Court of the United States is the court of appeals from the decisions of the different circuit courts. In this respect it is our House of Lords. When an appeal is before it in a suit in equity, it sits as the supreme court of appeals in chancery. The next case may be a writ of error in a suit at common law, or an appeal in admiralty. For

¹ [It is hardly necessary to remind the reader that since the Act of 1890-1891, the Circuit Court has had no appellate jurisdiction, that jurisdiction having been transferred to the new Circuit Court of Appeals.]

² [Redfield v. Parks, 132 U. S. 239; Kircher v. Murray, 54 Fed. Rep. 617.]

³ [Elliott v. Shuler, 50 Fed. Rep. 454.]

⁴ [Ridings v. Johnson, 128 U. S. 212, 217. Cases have been dismissed from the United States Supreme Court for failure to observe this distinction. See Thompson v. Railroad Companies, 6 Wall. 134; Bennett v. Butterworth, 11 How. 669, 674.]

⁵ Burnes v. Scott, 117 U. S. 582, 587.

the time being, it is a court of chancery, or of common law, or of admiralty,¹ according to the nature of the case before it, and each case is decided strictly according to the principles of that particular jurisdiction as rigidly as if that were the only jurisdiction which the court was empowered to exercise.

28. In Massachusetts, full equity jurisdiction is now conferred upon the Supreme Judicial Court.² That court is also a court of common law and a supreme probate court. But every case in that court is governed by the same rules which I have stated in reference to the Federal courts. Equity cases proceed, are heard and determined, as if the court were exclusively a court of chancery. Equity causes are heard in the first instance by a single judge, and from his decree an appeal lies to the full court.³

Having thus attempted an outline of the constitution and methods of a court of chancery, our next preliminary step is to state the general scope of equity jurisdiction, and some of the particulars in which it most broadly differs from the common law.

¹ [Since the Act of 1890-1891, just mentioned, appeals in admiralty, except in some rare instances where a new question of law is raised, are heard by the circuit courts of appeal, not by the Supreme Court.]

1877. By statute of 1883, the Superior Court has also original and concurrent jurisdiction in equity.]

³ [For notes on the relation of equity courts to law courts in the different States, see 1 Pomeroy's Equity, §§ 41, 42; Bispham's Equity, § 14, 15.]

² [This was done by the Act of

CHAPTER II.

SCOPE OF EQUITY.

29. MITFORD (afterward Lord Redesdale), in his work on Pleading in Equity, has thus stated the jurisdiction. I quote it as what one of the "masters in equity" has been able to say upon this subject; but I confess that, like most abstract statements, it has afforded me little help to an understanding of the subject.

He says: "The jurisdiction of a court of equity, when it assumes a power of decision, is to be exercised (1) where the principles of law, by which the ordinary courts are guided, give a right, but the powers of those courts are not sufficient to afford a complete remedy, or their modes of proceeding are inadequate to the purpose; (2) where the courts of ordinary jurisdiction are made instruments of injustice; (3) where the principles of law, by which the ordinary courts are guided, give no right, but upon the principles of universal justice the interference of the judicial power is necessary to prevent a wrong, and the positive law is silent.

"And it may also be collected that courts of equity, without deciding upon the rights of the parties, administer to the ends of justice by assuming a jurisdiction (4) to remove impediments to the fair decision of a question in other courts; (5) to provide for the safety of property in dispute pending a litigation, and to preserve property in danger of being dissipated or destroyed by those to whose care it is by law intrusted, or by persons having immediate but partial interests; (6) to restrain the assertion of doubtful rights in a manner productive of irreparable damage; (7) to prevent injury to a third person by the doubtful title of others; and (8) to put a bound to vexatious and oppressive litigation, and to prevent multiplicity of suits.

And further, that courts of equity, without pronouncing any judgment which may affect the rights of parties, extend their jurisdiction (9) to compel a discovery, or obtain evidence which may assist the decision of other courts; and (10) to preserve testimony, when in danger of being lost, before the matter to which it relates can be made the subject of judicial investigation." (Page 112.)

I venture to think that a simpler classification which, although it is by no means exhaustive, includes the principal topics of equity, may afford a better general idea of the subject.

Equitable Subject-Matter.

30. Equity differs from the common law in the subject-matter with which it deals. Courts of chancery recognize and enforce equitable titles and interests in distinction from strictly legal titles.

The common law knows but one title, and that is the legal title. It is a maxim at common law, that whoever has the better legal title prevails, and a party must recover, if at all, by strength of his legal title. Whether the suit is to recover land, or the amount due on a promissory note, or damages for the breach of any contract, no action can be maintained unless the plaintiff has the legal title to the land, the note, or the contract, as the case may be.

But it often happens that, although the legal title to property is in one person, the beneficial interest, *i. e.* the right to its use and enjoyment, is in another. This beneficial interest is, in legal phraseology, the equitable title and interest, and, as you see, it constitutes the real interest. The holder of the legal title holds it, or should hold it, simply for the benefit of, or in legal phrase in trust for, the other person, and he is called a trustee, the beneficiary being the *cestui que trust*, — *i. e.* the person for whose benefit the trust is held.

And yet this great beneficial interest the common law wholly ignores. It does not admit, it cannot even conceive of, its existence. It furnishes it with no legal remedies, and allows it no standing in its courts. At common law if a

plaintiff counted on an equitable title his declaration would be demurrable.

31. On the other, hand it is the peculiar and beneficial province of equity to take this great class of interests into its keeping. The title of the beneficiary is always the paramount title in equity against the holder of the merely legal title. There is hardly a conceivable question growing out of the relations of trustee and *cestui que trust*, or third persons, in reference to this peculiar species of property which a court of equity will not entertain.

32. The trust of which I have spoken may arise in either one of two ways. First, it may be an express trust, *i. e.* created by the owner of the property by some express declaration. For example, the owner of an estate conveys or devises it to A upon the express trust that he shall collect the rents and income and pay them over to B. Second, it may be created by law, that is, in view of the circumstances under which the legal title was acquired, or is held, equity declares that the rightful title and interest to the property are in another, and it converts the holder of the legal title into a trustee of the estate for the benefit of such other person. It is in respect to this second class of trusts — trusts implied or created by law — that controversies chiefly arise, and the aid of a court of chancery is most frequently and advantageously invoked.

33. Bearing in mind, then, that it is the great province of equity to recognize, protect, and enforce equitable titles and interests as distinguished from legal titles, you will have a landmark to go by in my classification. The first distinctive characteristic of equity is the subject-matter with which it deals, namely, the protection and enforcement of equitable titles and interests.

34. The second general division that I make in reference to equity jurisprudence is, that it consists in the peculiar remedies which it affords, as distinguished from any remedies furnished by the common law.

It is to be observed that the jurisdiction under this head does not depend upon the nature of the subject-matter, that is, upon the title or interest which is involved in the suit,

but upon the peculiar character of the remedy, or relief which equity gives in the particular case; and a very large portion of the jurisdiction actually exercised in equity consists of those cases where its aid is invoked on account of the peculiar relief which it gives, in distinction from any remedy to be had at common law.

35. Of all suits and remedies at common law three general observations are true: 1st. No suit lies to prevent an injury to property; the common law can only give damages for an injury already done. 2d. Common law cannot compel the performance of any duty, whether that duty arises from a contract or is implied or imposed by law. It can only compensate the injured party by awarding him damages against the wrong-doer or delinquent for the injury actually sustained. 3d. In all suits at common law upon written contracts or other written instruments, the instrument must stand or fall as it is written. No correction or alteration of any of its terms is permissible, however clear the proof may be that a mistake was made in writing it. I repeat, the common law cannot restrain injuries; it cannot enforce the performance of any contract or duty; it cannot rectify written instruments.

Now it is clear that any system of law which can interpose only after a wrong has been done, which is impotent to stay the hand of the wrong-doer and can deal with him only after he has accomplished his threatened injury; which is powerless to compel men to perform their obligations, and can only give damages for their non-performance; which cannot take notice of or repair the mistakes and omissions that so often occur in business affairs, is as a remedial system grossly imperfect and deficient, — but such is the common law.

36. On the other hand, the second characteristic of equity is that it furnishes remedies unknown to the common law. In this particular we may well repeat the words of Lord Bacon, that “chancery was ordained to supply the deficiencies of the common law.” These remedies may be summed up in four classes: 1. Remedies to prevent injury. 2. Remedies to compel the performance of a legal duty, whether that duty arises from an express contract or is implied or

imposed by law. 3. Remedies to correct or cancel written instruments. 4. Remedies to discover evidence.

This enumeration does not include all the remedies peculiar to a court of equity, many being of a very special and limited character; but it does include the great body of cases in which equity exercises jurisdiction on account of the peculiar relief which it affords, as distinguished from any redress to be had at common law.

I. *Remedies to Prevent Injury.*

37. A few illustrations may render the subject more clear. A court of equity has power to prevent the perpetration or repetition of a wrong to property, and this it does by its great remedy, injunction.

For example, a person owns and occupies a water-power, a mill, in which he is carrying on a manufacturing business. If anybody unlawfully diverts the water to which he is entitled, the common law can only give the mill-owner a verdict for what damages he may have sustained. In the mean time his mill is stopped, his business broken up. Not improbably, the wrong-doer is insolvent, and thus irreparable injury is sustained.

Equity, however, in a proper case, can lay its hand at once upon the trespasser, compel him to desist, to repair the injury which he has done, and to abstain in future from a repetition of the wrong. Many other similar instances might be stated.

38. You may take this as a general rule: whenever a person threatens or undertakes to perform any act affecting property, contrary to the legal right of another, the consequences of which will be great or irreparable injury, equity will give relief by a writ of injunction.

This remedy is peculiarly applicable to all cases of nuisance, waste, repeated or continuous trespass, infringement of patents and of copyrights.

II. *Remedies to Compel Performance of a Legal Duty.*

39. At the common law, if a person breaks his contract, or refuses to perform it, the only redress is a suit to recover

damages. For example, if A has agreed to sell to B a certain house, or a certain picture or statue, or other work of art, and refuses to perform his contract, all that the common law can do for B is to give him an action against A for damages. But it is obvious that in these instances, and in innumerable others which might be cited where the whole object of the contract was to obtain a particular house, painting, or statue, mere damages in money for refusal to deliver the property furnish no adequate relief.

That is all, however, that a court of law can accomplish. On the other hand, a court of equity can compel the delinquent person to do complete justice by requiring him to convey or deliver to the other the specific property contracted for, and thus fulfil his contract, *i. e.* it can require specific performance of his agreement.

III. *Remedies to Correct or Cancel Written Instruments.*

40. At law a contract must stand as it is written. It is not permitted to set up that any mistake exists in it. It is a familiar rule of evidence that no parol testimony is admissible to vary a written instrument.

But in equity it is always permissible to show that the written instrument, by some mistake of the parties, does not express their real agreement; and upon this proof, equity will reform the instrument to correspond to the real agreement. You can readily perceive how important a branch of remedial justice this is, and how valuable in many instances to prevent the fraud and injustice which would ensue if great mistakes made in drafting instruments were beyond the power of the court to correct. Equity, then, will correct mistakes, and will reform written instruments so that they shall express the real agreement of the parties.

41. But there is another function which a court of equity will fulfil in reference to written instruments, often as important as their correction, and that is their rescission or cancellation.

It sometimes happens that a written obligation or instrument has been obtained from one person by the fraud of another, and so was void in its inception. Or, although

originally valid, it may by subsequent agreement or circumstances of the parties have ceased to be binding; and yet in both of these instances the fact that the instrument is outstanding in the hands of one of the parties, who insists that it is still in force as against the other, may be a great injury to the latter.

For example: A gives to B a negotiable promissory note. Let us make in turn two suppositions in regard to it: First, that the note was procured from the maker, A, by the fraud of the payee, and is without consideration. It is therefore clearly void in the hands of B, the original payee. But as it is a negotiable note, if before it is due the payee transfers it to an innocent person for a consideration, it will be good in the hands of such innocent holder as against the maker, and he will have to pay it.

Now at the common law, under these circumstances, the maker is at the mercy of the payee. If the payee transfers the note, as I have stated, the maker must pay it. But equity will give immediate relief by enjoining the payee from negotiating the note, and compelling him to deliver it up to be cancelled.

42. Or, to take a second supposition, the note may have been valid originally, but the maker may have paid it before it became due, upon the holder's promise to deliver it. The holder, however, turns upon his heel, denies the payment, and asserts that it is still due. Here again the note, if passed before due to an innocent holder, would be valid as against the maker, and therefore equity will give him relief by enjoining the holder from negotiating it, and by ordering it to be cancelled.

IV. *Remedies to Discover Evidence.*

43. At common law neither party could be a witness for himself, nor could he examine the adverse party as a witness. Nor could one party, by any process known to the common law, compel the other party to make any disclosure whatever of facts material to the case.

This state of things has to some extent been changed by

special legislation in many of the States.¹ In Massachusetts,² for instance, parties are now competent witnesses for themselves, and they may be called and examined as witnesses by the other side. Each party also, without calling the other as a witness, may, previous to the trial, file interrogatories to the other party for the discovery of facts material to the case of the party filing the interrogatories.³ But nothing of this kind existed at the common law, and, as I have said, no means were afforded by which either party could extort from the other the disclosure of any facts or documents material to his case.

44. This great want led to the adoption by courts of chancery of the remedy known as a bill of discovery. This is a bill by which one party calls upon the other to make a disclosure of facts in his knowledge material to the case of the party bringing the bill, and also of all deeds, writings, or other things in his custody, possession, or power relative to the issue.⁴

Primarily, this bill of discovery was allowed only in aid of an existing suit at law, or where the person filing the bill alleged that he was about to bring a suit at law, and needed the information to enable him to maintain the suit, or in aid of a defence to an existing suit at law.⁵ For the right to a bill of discovery was quite as important to a defendant in a suit at law as to the plaintiff.

45. But it was subsequently permitted to have a broader scope; and it is now true, as a general rule, that where a party is entitled to maintain a bill in equity for discovery, and obtains the discovery, the court will go on and give him

¹ [For the effect of such statutes upon the equity jurisdiction, see *infra*, page 478. It is a general principle (which it might be convenient for the student to have anticipated here) that equity jurisdiction is not ousted by the fact that a similar jurisdiction has been conferred by statute upon the common-law courts, or has been assumed by such courts. *Bromley v. Holland*, 7 Vesey, 2, 19; *King v. Baldwin*, 17 Johns. Rep. 384;

Lee v. Lee, 55 Ala. 590; *Labadie v. Hewitt*, 85 Ill. 341; *Nudd v. Powers*, 136 Mass. 273, 278; *Wells v. Pierce*, 27 N. H. 503; *Schroeder v. Loeber*, 75 Md. 195; 1 Pomeroy's Eq. § 277.]

² Mass. Pub. Stats. ch. 169, § 18.

³ Mass. Pub. Stats. ch. 167, § 49.

⁴ 2 Story's Eq. Jurisp. § 689, 13th ed.

⁵ [See chap. 30.]

the appropriate relief which his case calls for, and will not turn him over to the expense and inconvenience of another suit at law.

Such bills are known as bills for discovery and relief. The foundation of jurisdiction in equity, however, in all these cases, you must observe, is the discovery which could be obtained only in equity. That is the peculiar relief, unknown to the common law, which justifies the appeal to equity; and, this discovery having been obtained, the court, having thus got possession of the case, will as a general rule proceed to give the plaintiff final relief, although such final relief may be identical with that which a court of law would give in the same case.¹

46. Cases of fraud and of account furnish, perhaps, the most frequent instances where bills for discovery and consequent relief are allowed, and where damages or the balance due in money is the only relief given.

It is not an invariable rule that a court of equity will proceed to give relief in cases where discovery has been granted and obtained. This is a matter of discretion. Nor is the rule itself, that a court of equity having obtained jurisdiction for the purpose of discovery will entertain the suit for the purpose of relief, as commonly adhered to in England as it is in this country.²

47. The rule adopted by the United States Supreme Court is thus stated by Chief Justice Marshall in the leading case upon the subject:—

“If certain facts essential to the merits of a claim purely legal be exclusively within the knowledge of the party against whom that claim is asserted, he may be required in a court of chancery to disclose those facts; and the court, being thus rightly in possession of the cause, will proceed to determine the whole matter in controversy.”³

But in *Emery v. Bidwell*⁴ it is said, that if a bill is brought primarily for relief, it cannot be maintained for discovery.

¹ [*Segar v. Parrish*, 20 Grattan, 672; *Lancy v. Randlett*, 80 Me. 169; see 1 Pomeroy's Eq. § 223.]

Holmes v. Holmes, 36 Vt. 525; *Isham v. Gilbert*, 3 Conn. 166.]

³ *Russell v. Clark's Ex'rs*, 7 Cranch, 69, 89.

² [For a discussion of the right

⁴ 140 Mass. 271.

The characteristics of a bill of discovery will be a subject for our study hereafter. I now mention it in this general way as constituting the fourth great distinctive remedy of a court of equity, and so far marking the outlines of equity jurisprudence; viz., the bill of discovery pure and simple, and the bill for discovery and for consequent relief.

Equitable Parties.

48. The third and remaining ground of equity jurisdiction consists in the peculiar character of the parties to whom it furnishes relief.

The first great ground of equity jurisdiction, as we have seen, is the peculiar subject-matter in controversy with which it deals, namely, equitable as distinguished from legal titles and interests. The second ground consists, not in the subject-matter of the controversy, but in the peculiar relief given.

And now the third ground consists, not in the subject-matter nor in the nature of the relief, but in the peculiar character of the parties to the controversy.

49. There are certain parties who can neither sue nor be sued at common law; and yet very often controversies arise, affecting their rights of property, for which some remedy should be provided under any government professing to be one of law. These may be divided into two classes.

The first and most important class consists of those cases where the parties, on account of their character, or relation to each other, cannot sue at law. These include, —

(1) Suits between husband and wife. (2) Suits by or against married women relating to their property. (3) Suits between partners.

50. The second class consists of those cases where the rights involved in the controversy are so numerous and diverse that, by the rules of the common law, they cannot be adjusted in a single suit. This is an important and well-settled branch of equity jurisprudence.

In every suit at common law, only two interests can be at stake, — one represented by the plaintiff or plaintiffs, and the other by the defendant or defendants. The plaintiffs and

defendants may consist of several persons, but the interests represented on one side and on the other respectively must be a unit. Thus, in a suit on a promissory note, the plaintiff or plaintiffs must be the holders of the note. If they are more than one, as if the promise be to A, B, and C, still they all represent but one interest; or, if the makers of the note are more than one, as the rest of the alphabet, there is still but one promise, and all the defendants constitute and represent but one party and one interest.

It is a familiar rule at common law that no suit will lie upon a contract unless all the parties named as plaintiffs have a joint and common interest in the contract. The promise which it contains must have been made to them as to one person, and must have been made by all the defendants (if more than one) as by one person; *i. e.* it must be a joint promise. If one promise is made by one defendant, and another by another, no one suit lies at common law against all the defendants on these different promises, but a separate suit must be brought against each one. A suit at law lies only where all the plaintiffs have one united interest, and where all the defendants, on the other hand, are charged with a common obligation.

51. If three or more distinct and adverse interests are at stake, they cannot be adjusted by any one suit at law. For example, a fund is held by A, to which B and C both make independent claims. These claims cannot be adjusted in a single suit at law. If B sues A for the fund, he cannot join C, because C's interest is not joint with his own, but is adverse, and a judgment in that suit would not determine C's right to the same fund; and thus A might be exposed by different verdicts to pay the fund over twice, both to B and C. The common law furnishes no remedy and no security for A against such a liability; but in equity, a single suit would settle these conflicting interests at once and forever if the parties derive title from the same source.

52. In these and similar cases, where the interests involved are numerous and cannot be settled in one suit at common law, equity will take jurisdiction. Untrammelled by the technical rules of the common law as to parties, it can sum-

mon before it all persons interested in the subject-matter, and in one suit settle and dispose of the whole controversy.¹

This is an ancient head of equity jurisdiction. It is expressly conferred upon the Supreme Judicial Court of Massachusetts by Pub. Stats. ch. 151 (sec. 2, clause 6): "Cases in which there are more than two parties having distinct rights or interests which cannot be justly and definitely decided and adjusted in one action at the common law."²

53. There are undoubtedly several subjects of equity jurisdiction which cannot without overstraining be included philosophically under any of the preceding heads, such as accident, prevention of multiplicity of suits, and others which will be considered in their turn. But in the three great divisions which I have made, and which for convenience I may call, 1st, The equitable subject-matter; 2d, The equitable remedy; and, 3d, The equitable parties, I trust that we have a useful general outline, and, for most cases, a practical test of what constitutes equity jurisprudence.

¹ [Mayor of York v. Pilkington, York, 54 N. Y. 159; Woods v. 1 Atk. 282; City of London v. Perkins, 7 Bro. P. C. 602; Black v. Monroe, 17 Mich. 238.]
² [For cases on interpleader, see Shreeve, 7 N. J. Eq. 440; Third Ave. R. R. Co. v. Mayor of New p. 501.]

CHAPTER III.

CONCURRENT JURISDICTION.

I TAKE up now another important topic, preliminary in its character, which may be entitled, *No Jurisdiction in Equity where there is a Complete Remedy at Law*. But we must approach it by some careful steps.

54. It is apparent, from what has already been said, that jurisdiction in equity is either exclusive or concurrent,—exclusive as to those matters of which a court of law can never have jurisdiction; concurrent as to those matters which are common to both courts. Exclusive jurisdiction necessarily includes, and is limited to, those cases cognizance of which is taken solely on account of the peculiar nature of their subject-matter, and of which, as I have endeavored to explain, equity takes cognizance because a court of law, from its very nature, cannot deal with them. Of this class, all cases relating to trusts, or purely equitable titles or interests, are familiar examples.

55. But where the jurisdiction is invoked on account of the peculiar remedy which equity affords in a given case, in distinction from the remedy which a court of law can give,—in all these cases, as a general rule, its jurisdiction is concurrent with that of the common law. The common law has jurisdiction over the same causes of action, but the remedy there is very different from that which a court of chancery gives for the same grievance. This constitutes the second division of which I spoke where, although the subject-matter of the controversy is, or may be, common to both courts, the difference between the two courts consists in the kind of relief or redress which each affords in the given case.

Jurisdiction is exclusive whenever equity takes cognizance on the ground of the subject-matter; it is concurrent whenever the ground of its jurisdiction is the peculiar relief which it gives.

Concurrent Jurisdiction. — Fraud.

56. The two very comprehensive titles of fraud and contracts are illustrations of cases of concurrent jurisdiction. In all cases of fraud a court of common law has jurisdiction, but the only remedy which it can give is damages to the defrauded party.

Equity also has concurrent jurisdiction over cases of fraud, but its jurisdiction does not extend to every case. It takes jurisdiction only when the case calls for or justifies the peculiar remedy or relief which a court of equity can give. For example: A has obtained by fraud a conveyance of real estate from B. Here B has his choice of two remedies. He can sue A at law for damages for the loss of property which he has sustained by the fraud of A. But in most cases more complete justice will be done if, instead of that, B can be repossessed of the property which is truly his; and therefore equity, upon a proper bill, will order A to cancel the deed fraudulently obtained of B, and to reconvey the property to him. In both cases the fraud of A is the subject-matter of the suit, — the jurisdiction is concurrent, — and equity takes cognizance of the suit, not because of the subject-matter, but because the case calls for special equitable relief.

57. On the other hand, let us suppose that one man induces another to pay a high price for a horse, by false representations as to his qualities. Here again there is fraud, a matter in one sense common to both courts; but in this case equity has no jurisdiction, inasmuch as there is no possible occasion for its peculiar relief. A suit for damages on account of the fraud (those damages consisting in the difference between the actual value of the horse and the price paid for him, or what he would have been worth if the representations had been true) is the only remedy that the case calls for or admits of.

Whenever, therefore, the object of the suit is simply to recover damages in money, equity will not take jurisdiction, because the relief sought is precisely the same “in quantity

and kind" as a common-law court would give. There is consequently no necessity for appealing to a court of equity.¹

58. In treating of the concurrent jurisdiction of a court of equity, passing from fraud we come to the matter of CONTRACTS. This also is a subject-matter common to courts both of law and equity, and therefore the jurisdiction of a court of equity over it is concurrent and not exclusive.

Whenever a court of equity takes jurisdiction over a controversy or claim based upon a contract, it is because the relief sought for in the particular case is more complete and just than that which a court of law can give. In cases of contract, the peculiar remedy is the foundation of the jurisdiction in equity. In all suits, therefore, brought to recover merely the amount due under a contract, or damages for the breach of a contract, the remedy is exclusively at law. It is not enough that there is a contract in existence, or that it has been broken, to invoke the aid of a court of equity. Some other element, which presents ground for equitable relief, must be introduced in the case.² For example, there is no occasion for the help of a court of equity to recover the amount due on a promissory note, and therefore a suit at common law to recover the amount is the only remedy.

59. Suppose, on the other hand, an agreement by A to convey to B a certain estate. A suit at law will lie in favor of B to recover damages for the breach of the contract. This is as far as a court of law can go. But this may be a very inadequate remedy. B wants that particular house, and equity furnishes complete relief by compelling A to convey the estate to B in fulfilment of his agreement, and by reason of this special relief equity will take jurisdiction.

60. The fact of this concurrent jurisdiction, that there are many subjects common to both courts, and that equity takes jurisdiction of them only when occasion arises for the appli-

¹ [Ambler v. Choteau, 107 U. S. 586; Clifford v. Brooke, 13 Ves. 131; Blackwell v. Oldham, 4 Dana (Ky.), 195; Russell v. Clark, 7 Cranch, 69, 89; Coe v. Turner, 5 Conn. 86; Woodman v. Freeman, 25 Me. 531.]

² [Hatch v. Cobb, 4 Johns. Ch. 559; Cochran v. Cochran, 2 Del. Ch. 17; Stewart v. Cochran, 80 Ill. 192; Ward v. Peck, 114 Mass. 121; Torrey v. Camden, &c. R. R. 18 N. J. Eq. 293.]

cation of the peculiar remedies which it affords — brings us to a consideration of the very important rule which lies at the threshold of our subject, namely, equity will not take jurisdiction whenever there is a plain, adequate, and complete remedy at common law.

In determining upon his course in any case, this is the first question for the practitioner or the student to solve, Is there a complete remedy at law? If there is, then a court of chancery will not entertain the case. If no such remedy is to be had at law, he will then be prepared to make the next inquiry, whether equity can afford him any redress. It therefore becomes necessary to understand the scope of the rule under consideration. It is one of great practical importance and of almost daily application. Reported cases are very numerous where bills were dismissed on the ground that the plaintiff had a proper and complete remedy at law. I therefore propose, at the risk of being tedious, to call attention to some of the leading considerations upon the subject; especially as this topic, so far as I know, is not treated with fulness in any treatise or text-book. In doing so I shall necessarily refer by way of illustration to several subjects which will be matters for more special consideration hereafter, although this will involve a certain repetition.

61. It has been said by high authority¹ that the principle, that courts of chancery will not interfere where there is a complete and adequate remedy at law, is as old in English equity jurisprudence as the earliest period of its recorded history.

The United States Judiciary Act,² *i. e.* the act which originally established the courts of the United States and defined their jurisdiction, expressly provided that jurisdiction in equity should be confined to cases where there was not a plain, adequate, and complete remedy at common law. A similar provision exists in the legislation of Massachusetts,³

¹ *Lewis v. Cocks*, 23 Wall. 466, Swayne, J., citing Spence's Jurisdiction of Courts of Chancery, 408, note b.

² Stat. 1789, ch. 20, § 16; Rev. Stats. U. S. ch. 20, § 723.

³ Pub. Stats. ch. 151, § 2.

and, I presume, in that of most if not of all the States where equity jurisdiction has been conferred by statute.

It has frequently been said by the Supreme Court of the United States that this provision in the Judiciary Act was but an affirmation and adoption of the well-settled rule in chancery, as old as the court of chancery itself, which that court, as a court of chancery, would have been bound to adopt and enforce, even in the absence of any express legislation on the subject. The Supreme Court has also very recently said¹ that this enactment in the Judiciary Act "certainly means something; and, if only declaratory of what was always the law, it must at least have been intended to emphasize the rule, and to impress it upon the attention of the courts." And this effect it undoubtedly has had, for the rule itself has been observed much more strictly in this country than in England.

62. By the terms of the rule, in order to exclude jurisdiction in equity, the remedy at law must be "plain, adequate, and complete." To follow the language of the United States Supreme Court: "It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity."² This early declaration of that court as to the true meaning of the rule has repeatedly been cited and approved in subsequent cases.

It is clearly, then, not enough to exclude jurisdiction in equity that some remedy exists at law. The rule itself assumes that there is some remedy at law. But whenever that remedy is inadequate to meet the justice of the case, the recourse to chancery becomes justified.³

¹ *N. Y. Guaranty Co. v. Memphis Water Co.* 107 U. S. 205, 214.

² *Boyce's Exrs. v. Grundy*, 3 Peters, 210.

³ [*Clark v. Jeffersonville R. R. Co.* 44 Ind. 248; *Watson v. Sutherland*, 5 Wall. 74; *Edsell v. Briggs*, 20 Mich. 429; *Earley's Appeal*, 121 Pa. St. 496; *Freeholders of Essex v. Newark Bank*, 48 N. J. Eq. 51.

It is not sufficient to confer equity jurisdiction that the evidence will be voluminous and its taking tedious: *Bowen v. Chase*, 94 U. S. 812. Equity will not set aside a will on the ground of fraud, mistake, or forgery: *Broderick's Will*, 21 Wall. 503. Equity will not entertain a question of boundary in the form of an application for in-

Contracts.

63. Taking the subject of contracts for our first illustration of the scope and limits of the rule, there are three main methods in which equity deals with them; one is by enforcing the specific performance of a contract; the second, by cancelling a contract; the third, by reforming a contract. Performance, cancellation, reformation, — these, in the case of contracts, are the three remedies peculiar to a court of equity.

The last, the reformation of a contract, need not concern us now, because a court of law never undertakes to reform a contract, or to furnish any remedy analogous thereto. And I now discuss the other two topics of performance and cancellation only so far as they bear upon the principle which we are considering, that chancery will not take jurisdiction where there is a complete remedy at law.

64. First, then, as to SPECIFIC PERFORMANCE. The ground upon which a court of equity proceeds in enforcing the specific performance of contracts for the sale of property is this, that the motive, the object, of the purchaser in entering into a contract of this nature, is to acquire the specific property which is the subject of the contract; and this being so, nothing less than the transfer of that specific property can fully satisfy the contract, or give to the purchaser all that he is entitled to have.

This consideration lies at the foundation of the doctrine of specific performance. Mere damages for breach of the contract are no adequate relief where the whole purpose of the contract was to obtain the specific property contracted for, and therefore equity will compel the vendor to do complete justice by a transfer of the property itself.

65. This rule is as applicable to personal property as to real property. Formerly a broad distinction was attempted to be made between contracts for the sale of real estate and

junction as between adjacent land- Bank, 20 N. H. 347. See also, gen- holders: *Dickerson v. Stoll*, 8 N. erally, *Barrett v. Sargeant*, 18 Vt. J. Eq. 294. Equity will not grant 365; *Claussen v. Lafrenz*, 4 Greene (Iowa), 224.] an injunction unless the injury will be irreparable: *Kimball v. Grafton*

those for the sale of personal chattels. Of the former it was said that courts of equity would always take jurisdiction, because it was assumed as a matter of course, in reference to property of that character, that the acquisition of a particular piece of property was the object of the contract.¹ On the other hand, the rule has been laid down, in terms almost as general, that ordinarily courts of equity will not enforce contracts for the sale of personal chattels, "because" (as has been said) "damages at law, calculated upon the market price of the stock or goods, are as complete a remedy to the purchaser as the delivery of the stock or goods contracted for, inasmuch as with the damages he may purchase the same quantity of the like stock or goods."² In this latter case the object of the purchaser is not supposed to be the possession of any specific shares in the public funds, or of any specific grain, lumber, or other chattel to which the contract relates. Any shares, grain, or lumber conforming to the description in the contract would answer the object of the purchaser just as well; and therefore, if he is allowed such damages as will enable him to go into the market and purchase the same kind and quantity of goods, he has substantially all that his contract calls for, and therefore equity will not enforce its specific performance.³

Where, however, it was obvious from the character of the chattel that the possession of the particular thing contracted for was the motive of the contract, — as a picture, for example, or other object of art, — equity has never hesitated to enforce the contract.

66. Nor, of late years, has it felt much hesitation in enforcing the performance of contracts where there was nothing peculiar in the nature of the chattel except that it was

¹ [Hall v. Warren, 9 Ves. 605; Bogan v. Daughdrill, 51 Ala. 312; Brewer v. Herbert, 30 Md. 301; Old Colony Railroad v. Evans, 6 Gray, 25, 36; Hopper v. Hopper, 16 N. J. Eq. 147; Nugent v. Smith, 85 Me. 433.]

² Adderley v. Dixon, 1 Simons & Stuart, 607.

³ [Savery v. Spence 13 Ala. 561; Bubier v. Bubier, 24 Me. 42; Hoy v. Hansborough, 1 Freeman Ch. (Miss.) 543; Cowles v. Whitman, 10 Conn. 121; Ferguson v. Paschall, 11 Mo. 267; Gove v. City of Biddeford, 85 Me. 393.]

not always or ordinarily to be bought in the market at a regular market price. In these cases, jurisdiction in equity is justified upon two grounds: 1st, the difficulty in fixing the measure of damages; and, 2d, the uncertainty that, with any measure of damages which may be allowed, the purchaser will be able to purchase the articles elsewhere.

Upon sound principle, no difference exists between contracts for the sale of real and those for the sale of personal property, based merely upon the character of the property. In both cases the ground of equity jurisdiction is the same, namely, that the purpose of the contract cannot be carried out by anything less than a transfer of the property itself. Whenever this is true in reference to a contract relating to personal chattels, the duty of a court of chancery to enforce it is just as apparent as it can be in any case relating to real property. And this, unquestionably, is the modern doctrine upon the subject.¹

67. The most that can be said is that a different presumption applies to the two cases. In regard to real estate, the conclusive presumption is that the motive of the parties was the purchase and sale of that specific thing, and equity therefore always takes jurisdiction. I say a conclusive presumption, because I think no case can be found where a court of equity has declined to take jurisdiction in reference to a contract for the sale of real estate on the ground that the purchaser had an adequate remedy at law. On the other hand, in regard to personal property the presumption is the other way, and it is only when a court of equity is satisfied, from the special nature of the property or from the circumstances of the case, either that the specific thing contracted for furnished the motive of the contract, or that the purchaser may not be able to obtain it elsewhere in the market, that it will assume jurisdiction.

The doctrine was well stated by Vice-Chancellor Leach,²

¹ [Adams v. Messinger, 147 Mass. patent will be enforced: Hull v. 185; Kirksey v. Fike, 27 Ala. 383; Pitrat, 45 Fed. Rep. 94.]

Summers v. Bean, 13 Grattan, 404; ² Adderley v. Dixon, 1 Simons & Williams v. Howard, 3 Murph. (N. Stuart, 607.

C.) 74. An agreement to assign a

as follows: "Courts of equity decree the specific performance of contracts, not upon any distinction between realty and personalty, but because damages at law may not in the particular case afford a complete remedy. Thus, a court of equity decrees performance of a contract for land, not because of the real nature of the land, but because damages at law, which must be calculated upon the general money value of the land, may not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value. So a court of equity will not generally decree performance of a contract for the sale of stock or goods, not because of their personal nature, but because damages at law calculated upon the market price of the stock or goods are as complete a remedy to the purchaser as the delivery of the stock or goods contracted for; inasmuch as with the damages, he may purchase the same quantity of the like stock or goods."

But, I may add, wherever the reason for this distinction does not exist, — that is to say, where the chattel contracted for may fairly be presumed to have "a peculiar and special value to the purchaser," or where, with such damages as a court of law would allow, the purchaser would not or might not be able to purchase "the same quantity of the like stock or goods in the market," — in all these cases equity should be as prompt to relieve as in cases concerning real estate.¹

Shares in Corporations and Government Bonds.

68. There is probably nothing else which enters so largely into the business transactions of mankind, or forms so large a staple of daily bargain and sale, as government bonds and shares in joint-stock corporations; and it is therefore important to ascertain, so far as we can, what the doctrine of the courts is upon this subject. The earliest case upon it is *Cuddee v. Rutter*.² That was a bill in equity to obtain the specific performance of a contract to transfer shares of South Sea stock to the value of one thousand pounds sterling. The Lord Chancellor, Parker, dismissed the bill, saying: "There

¹ See *Jones v. Newhall*, 115 Mass. 244.

² 1 W. & Tudor L. C. Eq. 786; 1 P. Wm. 570.

is no reason to bring this bill for a specific performance of this agreement, because there is no difference between this 1000*l.* of South Sea stock and another 1000*l.* of South Sea stock which the plaintiff might have bought of any other person upon the very day; and the plaintiff doth not suffer at all by the non-performance of the agreement specifically, if the defendant pays him the difference [*i. e.* between the contract and the market price]. . . . This differs very much from the case of a contract for lands, some lands being more valuable than others, — at least, more convenient than others to the purchaser, — but there is no difference in stock; one man's stock is of equal benefit and conveniency as another's." The whole ground of this decision is, that the stock in question was always to be had in the market, and therefore there was no necessity for the plaintiff to come into equity to get it; and that complete redress was to be had at law, where the plaintiff could recover the difference between the contract price and the market price of the stock.

In *Nutbrown v. Thornton*¹ Lord Eldon said that it was settled that a contract for the sale of stock would not be enforced in equity.

In England, the doctrine of *Cuddee v. Rutter*, so far as it applies to government funds, — "the calm security of the three per cents," (as Lord Eldon was wont to speak of them), — has uniformly been adhered to, and upon the assumed ground (suggested in *Duncuft v. Albrecht*, which I shall state immediately) "that it is always to be had by any person who chooses to apply for it in the market."

69. But in 1841 a new principle was established in England in reference to shares in joint-stock companies, and it was then definitely settled that equity would enforce the specific performance of agreements for the sale of shares of stock in corporations, and would not leave the party to his remedy at law.

The leading case is *Duncuft v. Albrecht*.² This was a bill to enforce an agreement to transfer fifty shares in a railway company. Vice-Chancellor Shadwell said: "I agree that it

¹ 10 Ves. Jr. 159.

² 12 Simons, 189, 199.

has been long since decided that you cannot have a bill for the specific performance of an agreement to transfer a certain quantity of stock. [N. B. He does not use the term "stock" in its more modern sense.] But, in my opinion, there is not any sort of analogy between a quantity of three per cents, or any other stock of that description (which is always to be had by any person who chooses to apply for it in the market), and a certain number of railway shares of a particular description, which railway shares are limited in number, and which, as has been observed, are not always to be had in the market." This decision was affirmed, on appeal, the next month (July, 1841) by Lord Chancellor Cottenham.

70. In *Shaw v. Fisher*,¹ decided in 1855, Lord Cranworth, on a similar bill, took the rule for granted, saying merely: "No doubt, unless there be some defence made, the plaintiff is entitled to a specific performance."

Three years later, in *Cheale v. Kenward*,² Lord Chancellor Chelmsford, on a similar bill, said: "There is no doubt that a bill will lie for a specific performance of an agreement to transfer railway shares. This was set at rest by *Duncuft v. Albrecht*."

In the year 1868, in *Coles v. Bristowe*,³ Vice-Chancellor Malins remarked: "It is perfectly settled that a bill for the specific performance of a contract for the purchase of shares is maintainable in this court," and on page 163 he gives a summary of the English cases on the point.

We may therefore safely assume that the English doctrine upon this subject is that equity will enforce agreements for the sale of shares in corporations; the reason for the rule being that the court presumes that this kind of property is not always to be had in the market, and therefore a transfer of the property itself should be decreed.

71. Perhaps the more important inquiry is, What is the rule in this country? That question does not admit of so definite an answer. The matter has never come before the United States Supreme Court. The nearest approach to it

¹ 5 De Gex, McN. & G. 596, 607.

² 3 De Gex & J. 27.

³ L. R. 6 Equity Cases, 149, 162.

is in *Mechanics' Bank v. Seton*.¹ In that case a bill was brought to compel a bank to cause a transfer of some of its stock to be made by a trustee to his *cestui que trust*, for whom he held it. There was no contract between them, but the bank set up a lien on the shares for a debt due to it from the trustee; and one ground of defence was that, inasmuch as it concerned personalty, the bill could not be maintained.

The court said: "Notwithstanding this distinction between personal contracts for goods and contracts for lands is to be found laid down in the books as a general rule, yet there are many cases to be found where specific performance of contracts relating to personalty have been enforced in chancery; and courts will only weigh with greater nicety contracts of this description than such as relate to lands. . . . If this had been a bill filed against the bank to compel a specific performance of any contract entered into with it for the sale of stock, it might then be urged that compensation for a breach of the contract might be made in damages, and that the remedy was properly to be sought in a court of law." But this is not to be taken as a decision, or even as an expression of opinion upon the point.

72. In only one case has the question arisen in any United States Circuit Court, so far as I can find, and that is *Ross v. Union Pacific Railway Co.*² That was a bill to compel the delivery of United States bonds and also of some shares in the Union Pacific Railway Company. The court refused relief. As to the United States bonds, the court followed the English doctrine concerning three per cents; and as to the stock it followed the earlier English doctrine, saying: "They [the stocks] are the subject of every-day sale in the market. . . . No especial value attaches to one share over another, and the money which will pay for one will as readily purchase another. The damages, then, for failure to deliver any such shares may be awarded at law, and be an adequate compensation for the injury sustained."³

¹ 1 Pet. 299, 305.

1 Dillon, 121; Strasburg R. R. Co.

² 1 Woolworth C. C. R. 26, 33.

v. Echternacht, 21 Pa. St. 220.]

³ [See, also, *Fallon v. Railroad Co.*

73 The later English doctrine seems to have been adopted in Massachusetts, where the question has arisen several times.

*Leach v. Fobes*¹ was a bill to enforce an agreement for the conveyance of real estate, and also of certain shares in corporations. The court held that as the agreement was entire, and as that part of it relating to land was clearly within equity jurisdiction, they would enforce the whole agreement, "without deciding whether a suit in equity can be supported for the sole purpose of enforcing a contract for the sale of shares in a corporation;" adding, however, that "the more recent authorities are quite decisive as to the authority of a court of chancery to decree the specific performance of a contract for the transfer of shares in joint-stock companies or corporations, in cases in which it appears that the capital stock is fixed at a certain amount and the number of shares is limited." There can be no joint-stock company where the capital stock is not fixed at a certain amount and the number of shares limited.

In *Todd v. Taft*² there was a bill to enforce an agreement to transfer fifty shares of railroad stock. Other defences were made, but the objection that the bill would not lie for a transfer of shares does not seem to have been taken by counsel or adverted to by the court. The bill was sustained.

In *Noyes v. Marsh*³ the bill was brought by the owner of stock to compel a purchaser to take and pay for it. The court held that the plaintiff had an adequate remedy at law, and therefore that he could have no relief in equity. The remedy is not stated, but I infer that it consisted in the right of the plaintiff to tender the stock, and then at law to recover the price, which was all that he could get in equity.

In *Somerby v. Buntin*⁴ the property contracted for was an interest in a patent. The court said that "it is now well settled that the jurisdiction of courts of equity to decree specific performance is not confined to contracts for the sale of land, but may be exercised, upon sufficient cause shown, over agreements for the transfer of interests in personal property," citing 11 Gray, 506, and 7 Allen, 371.

¹ 11 Gray, 506.

² 123 Mass. 286.

³ 7 Allen, 371.

⁴ 118 Mass 279, 287.

In *Wonson v. Fenno*¹ there was a bill against a partnership to enforce an agreement for the transfer of shares in a corporation. No question (so far as the report states) was made in the case as to the equitable jurisdiction, but the bill was dismissed on the ground that the plaintiff had lost his claim by his own laches; the firm having in the mean time transferred their stock to another buyer, without fraud.

74. So stands this question upon the authorities. Upon principle, it seems to me very clear and simple. If it appears on the face of the bill (as it should appear, or else the bill will be demurrable) that the plaintiff cannot, as a matter of course, go into the market and obtain the property in question,² then he should have relief in equity; for otherwise he is not made whole. The very ground upon which he is remitted in any case to a court of law is, that, with the damages there given him, he can go into the market and obtain the thing contracted for. But if, owing to the state of the market, or to the character of the article, or to the fact that the stock is limited in its amount, or if for any other reason it is seldom on the market and is not readily procurable, then a case is presented for equitable relief.³

75. An agreement may be made in good faith for the purchase and sale of a controlling interest in a corporation. The entire motive of the contract is to acquire this controlling interest. Mere damages at law will not enable the party to acquire the interest; and in such a case it is clear that equity should compel the performance of the contract. And this is the true test in every case, namely: Whatever the subject of the contract may be, if the money recoverable in a court of law will not certainly enable the plaintiff to go into the market and obtain a precisely similar article,

¹ 129 Mass. 405.

² [This, of course, would never be true of government bonds, which are always in the market; nor of any public bonds, such as those of municipalities: *Rollins Investment Co. v. George*, 48 Fed. Rep. 776.]

³ [*Bumgardner v. Leavitt*, 35 W. Va. 194; *White v. Schuyler*, 31

How. Pr. 38. Such a case arises where the value of the stock in question is fluctuating, and not easily fixed by a jury: *Treasurer v. Commercial Mining Co.* 23 Cal. 390; *Ashe v. Johnson*, 2 Jones Eq. (N. C.) 149; or where the stock is not yet on the market: *Austin v. Gilaspie*, 1 Jones Eq. (N. C.) 261.]

then the remedy at law is inadequate, and equity should compel specific performance; and by the weight of authority the modern doctrine is, that shares in corporations are of this limited nature, and therefore a bill to enforce agreements for the sale of such shares will lie.

76. There is a distinct ground upon which equity will take jurisdiction to enforce agreements for the delivery of personal property, when the purchase-money has been paid, namely, the insolvency of the vendor. In this case a judgment at law for damages would be of no value; and if the property is in the possession of the defendant, so that the court can exercise control over it, it would be a mockery of justice to abandon the purchaser to his action at law.

This possible ground of relief was suggested in *Doloret v. Rothschild*,¹ and in *Clark v. Flint*² it was distinctly laid down. Wilde, J., said: "On what plausible ground can it be contended that a judgment against an insolvent contractor is an adequate remedy? It would be manifestly against equity and justice for a court to decline jurisdiction in such a case. If the party injured by a breach of a contract cannot avail himself of his remedy at law for any beneficial purpose, or if it be doubtful whether he can or not, a court of equity, if it can relieve him, ought certainly to interpose and compel the other party to perform his contract." "If it be doubtful,"—this is so, for to exclude jurisdiction in equity the remedy at law must be "plain," as well as adequate and complete.

In this case the principal defendant had agreed to sell his interest in a ship to the plaintiff, and the plaintiff had paid him, but he transferred the interest to the other defendant, who had notice of the agreement and of the payment. The principal defendant was insolvent, and the court decreed that his interest in the ship should be conveyed to the plaintiff.

¹ 1 Sim. & S. 590.

² 22 Pick. 231, 238.

CHAPTER IV.

CONCURRENT JURISDICTION (CONTINUED.)

Cancellation of Contracts.

77. THE next class of cases in which we are to contrast the remedies at equity and at law is that of the cancellation of contracts. In the term "contracts" I include all written instruments, sealed and unsealed. The general rule upon this subject may thus be stated: Where a deed or other instrument exists which for any reason is void as against the maker, but the existence of which is or may be prejudicial to his rights, a court of equity will require the instrument to be surrendered and cancelled.

78. This rule is founded upon one or both of two considerations, according to the circumstances of the particular case, viz.:

(1) If the instrument is a deed under which the holder claims title, it operates as a cloud upon the title of the true owner, and embarrasses him in the enjoyment and sale of his property;¹ (2) the evidence to impeach the instrument and to show its invalidity may be lost if the defrauded party is obliged to await the pleasure of the unlawful holder of the instrument until he attempts to enforce it. A court of equity will not allow an innocent party to be subjected to this risk, and therefore, when a proper case is shown, it will order the obnoxious instrument to be cancelled. Equity recognizes the fact that great injustice may be done to an innocent party in the loss of testimony by mere delay in bringing the matter to a legal issue. His witnesses may die or forget, or other important means of proof may be

¹ [Hayward v. Dimsdale, 17 Ves. Eckman v. Eckman, 55 Pa. St. 269; 111; Pettit v. Shepherd, 5 Paige, Polk v. Rose, 25 Md. 153; Tucker 493; Douglass v. Scott, 5 Ohio, v. Kenniston, 47 N. H. 267.] 195; Christie v. Hale, 46 Ill. 117;

lost; and equity will never allow the fraudulent party to speculate upon or profit by such a contingency.¹

79. But this general rule is subject to that other rule, that the plaintiff cannot come into equity if he has a plain and adequate remedy at law. He has such remedy at law whenever the facts upon which he relies constitute as valid a defence to the instrument at law as in equity, and he has an immediate opportunity to make that defence.²

If the holder of the instrument has already sued upon it, then the maker has such an opportunity, and he does not need the aid of a court of equity. If the maker of the instrument can himself bring a suit at law which will test the validity of the instrument, then also he has no need to resort to equity.

But if such opportunity exists, and if the holder does not sue upon the note, — if he lies by, waiting his opportunity to strike when he can take his adversary at the greatest disadvantage, — equity will allow the innocent party to create an opportunity by calling his adversary at once into court, so as to have the fraudulent or void instrument put out of the way.

80. A few cases will serve as illustrations. In *Martin v. Graves*³ the grantee had fraudulently procured a deed conveying to him an estate after termination of an existing life estate. It was held that a bill in equity would lie to set aside the deed, for a writ of entry could not be brought, inasmuch as the grantee was not in possession, and did not claim possession until the termination of the life estate.

In this case the rule was stated in terms which have frequently been cited since with approval: "Wherever a deed or other instrument exists which may be vexatiously or injuriously used against a party after the evidence to impeach or invalidate it is lost, or which may throw a cloud or suspicion over his title or interest, and he cannot immediately protect or maintain his right by any course of proceedings

¹ [*Daniel v. Stewart*, 55 Ala. 278, *v. Cannon*, 49 Fed. Rep. 517; *Grand* 280; *Brooks v. Reams*, 86 Ill. 547; *Chute, &c. v. Winegar*, 15 Wall. Clark v. Ins. Co. 52 Mo. 272; *Alden* 373. See, also, pp. 470-472.]
v. Trubee, 44 Conn. 455.]

² 5 Allen, 601.

³ [*Northern Pacific Railway Co.*

at law, a court of equity will afford relief by directing the instrument to be delivered up and cancelled, or by making any other decree which justice and the rights of the parties may require."¹

The same doctrine has frequently been applied by the Supreme Court of the United States.²

81. *Pratt v. Pond*³ illustrates the converse. A deed had been obtained by fraud, and the grantee was in possession, claiming title. The assignee in insolvency of the grantor brought a bill in equity to set aside the fraudulent deed. The court held that, inasmuch as the grantee was in possession, a writ of entry would of course lie, in which action the validity of the deed could be settled, and consequently there was no need for equity to take jurisdiction.⁴

A more recent case, *Boardman v. Jackson*,⁵ was that of a forged deed. A person was in possession under lease from a grantee, who had forged a deed to himself, claiming title. A bill was brought by the true owner to set aside the deed. But the court held that he had a perfect remedy at law by means of a writ of entry.

In *Swamscott Machine Co. v. Perry*⁶ there was a fraudulent deed by a debtor. An execution creditor who had made a levy brought a bill to set the deed aside. It was held, as in the preceding case, that a writ of entry would afford him a full remedy at law.

In *Clouston v. Shearer*⁷ a bill was maintained in favor of the plaintiff in possession of an estate, against a person setting up a mortgage thereon, which the plaintiff asserted was void, the mortgagee not having entered or attempted to take possession.

¹ See, also, *Clouston v. Shearer*, 99 Mass. 209.

² *Holland v. Challen*, 110 U. S. 15.

³ 5 Allen, 59.

⁴ [*Bassett v. Brown*, 100 Mass. 355; *Burton v. Gleason*, 56 Ill. 25; *Illinois Land Co. v. Speyer*, 138 Ill. 137; *Ritchie v. Dorland*, 6 Cal. 33; *Crook v. Brown*, 11 Md. 158; *Bar-*

ron v. Robbins, 22 Mich. 35; *Walker v. Walker*, 63 N. H. 321; *Northern Pacific R. Co. v. Amacker*, 49 Fed. Rep. 529. *Contra*, *Almony v. Hick* 3 Head, 39. See, also, *Mortland v. Mortland*, 151 Pa. St. 593; *Billings v. Mann*, 156 Mass. 203.]

⁵ 119 Mass. 161.

⁶ 119 Mass. 123.

⁷ 99 Mass. 209.

"A court of chancery will restrain by injunction a threatened levy of execution upon real estate which is not legally subject to such a levy, and thus prevent a cloud upon the title, without compelling the owner of the land to wait until the levy has been completed, and then admit himself to be disseized, in order to maintain a writ of entry."¹

82. It may be accepted as a general rule that the law never requires the true owner of an estate to quit its possession, or surrender it to any claimant, in order to try the adverse title at law which is thus set up. The true owner will not be required to surrender any advantages which he already has. And therefore he is allowed to summon his adversary into a court of equity to have the validity of the deed or mortgage, or other title which is set up, determined once for all.

83. Passing from deeds we come to promissory notes. Equity jurisdiction here rests upon the same ground, namely, that an innocent person shall not, by the mere delay of the holder of an invalid instrument to sue upon it, be exposed to any loss or prejudice. Therefore a court of equity will entertain bills for the surrender and cancellation of invalid promissory notes, whether overdue or not, if no suit at law has been begun upon them.²

Two or three cases by way of illustration will suffice. In *Fuller v. Percival*³ one partner had given a partnership note to A on demand, in fraud of the firm. It was held that a bill would lie in behalf of the firm against A, compelling him to deliver up and cancel the note, although it was overdue. "The notes are negotiable, and although overdue may be sued on by such holder, or others to whom he may hereafter transfer them, to the embarrassment of the plaintiff, and no suit at law has yet been commenced upon them."

¹ *O'Hare v. Downing*, 130 Mass. 16; [*Norton v. Beaver*, 5 Ohio, 178; *Groves v. Webber*, 72 Ill. 606; *Sanders v. Yonkers*, 63 N. Y. 489; *Merriman v. Polk*, 5 Heisk. 717; *Trustees v. Bowman*, 136 N. Y. 521. *Contra*, *Drake v. Jones*, 27 Mo. 428.] *Delafield v. Illinois*, 26 Wend. 192; *Metler v. Metler*, 18 N. J. Eq. 270. In the following case the holder of a note refused to accept a tender of payment of it, or to cancel it: *Strafford v. Welch*, 59 N. H. 46.]

² 126 Mass. 381.

³ [*Huston v. Roosa*, 43 Ind. 517;

In *Anthony v. Valentine*¹ the bill was brought to enjoin a suit at law upon a note, on the ground that it had been obtained by fraud. The court held that this was a perfect defence to the suit at law pending, and therefore there was no occasion for the interference of equity.

Grand Chute v. Winegar.² This was a bill to enjoin a suit at law on bonds asserted to have been procured by fraud. The court held that there was a perfect defence at law, and so the bill was dismissed.³

84. It appears from the view which we have taken that there are three principal grounds, upon any one of which equity will assume jurisdiction to cancel written instruments:—

1st. To remove a cloud upon a title. 2d. In the case of negotiable instruments, to prevent a defence being lost by their transfer to an innocent holder. 3d. To prevent the loss of evidence.

Domestic and Foreign Judgments.

85. A domestic judgment is a judgment rendered by some court of the country in which the suit upon the judgment is brought. A domestic judgment is conclusive between the parties; *i. e.* in a suit at law upon it, it is not open to the defendant to impeach it for fraud or for any other cause.⁴ It is conclusively presumed to be correct.

A foreign judgment, however, when sued upon in some other forum, is not conclusive; but the defendant may show that the judgment was obtained by fraud, and may thus defeat it. Judgments of the several States are domestic judgments within this principle.⁵

86. This leads us to an important rule which is another illustration of our subject:—

(a) Inasmuch as a domestic judgment is conclusive at

¹ 130 Mass. 119.

² 15 Wall. 373.

³ *Allen v. Storer*, 132 Mass. 372, lessor and lessee; *Payson v. Lamson*, 134 Mass. 593.

⁴ [*Ambler v. Whipple*, 139 Ill. 311.]

⁵ *Hanley v. Donoghue*, 116 U. S. 1; [*Smith v. Lathrop*, 44 Pa. St. 326; *Pringle v. Woolworth*, 90 N. Y. 502. See U. S. Constitution, art. 4, § 1, and Rev. Stats. § 905.]

law between the parties, the remedy and the only remedy in behalf of the party against whom such a judgment has been obtained by fraud (if it be too late to move for a new trial) is by a bill in equity to set aside the judgment for fraud; there being, as I have said, no remedy whatever at law.¹

(b) But when a suit is brought upon a foreign judgment which has been obtained by fraud, inasmuch as that fraud constitutes a perfect defence to the judgment, the remedy at law is complete, and there is no occasion for equitable relief.²

If, however, no suit has been brought upon the fraudulent judgment, equity will then take jurisdiction to set it aside, because such outstanding judgment (like the outstanding fraudulent deed just mentioned) is a continual menace to the right of the defrauded party.

87. But if the party has negligently failed to make a defence at law, equity will not relieve him.³ It is well settled that courts of chancery will always refuse relief where the party had an opportunity to avail himself at law of the matter in question, and negligently failed to do so.

For example, if the defendant in a suit upon a foreign judgment fails to set up the defence that it was obtained by fraud, or, in a suit to recover land, fails to set up the defence that the deed was obtained by fraud, he cannot afterward go into equity and obtain relief upon this ground. He has had his day in court, — his opportunity to avail himself of these defences, and if he has not done so the fault is his own. The rule upon this subject has never been stated better than by Judge Curtis in *Hendrickson v. Hinckley*:⁴ “A court of equity does not interfere with judgments at law unless the complainant has an equitable defence of which he could not

¹ *Phillips v. Negley*, 117 U. S. 665; [*Brown v. Parker*, 28 Wis. 21; *Weiss v. Guerineau*, 109 Ind. 438; *Granger v. Clark*, 22 Me. 128; *Demerit v. Lyford*, 27 N. H. 541.]

² *Ochsenbein v. Papelier*, L. R. 8 Ch. App. 695; [*Hall v. Odber*, 11 East, 118, 124; *Barney v. Patterson*, 6 H. & S. 182.]

³ [*Franco v. Bolton*, 3 Ves. Jr. 368; *Little v. Price*, 1 Md. Ch. 182; *Smith v. Lowrie*, 1 Johns. Ch. 320; *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332.]

⁴ 17 How. 443.

avail himself at law, because it did not amount to a legal defence, or had a good defence at law which he was prevented from availing himself of by fraud or accident unmixed with negligence of himself or his agents.”¹

Instruments Void upon their Face.

88. Where the instrument is void upon its face,² equity will not take jurisdiction, but will leave the party to his defence at law.

89. The earlier English doctrine was that equity would relieve against an instrument although its illegality was apparent upon its face. Lord Eldon is supposed to have favored this jurisdiction,³ and so also Chancellor Kent.⁴ In *Peirsoll v. Elliott*,⁵ the Supreme Court, through Chief Justice Marshall, expressed a contrary opinion, although the point did not require absolute decision in that case.

In *Simpson v. Lord Howden*,⁶ decided in 1827, Lord Chancellor Cottenham settled the law for England that equity would not take jurisdiction in the case supposed, inasmuch as the remedy at law was complete. And Lord Chancellor Selborne, in *Hoare v. Bremridge*,⁷ said: “I have always understood the law of this court to be as explained by Lord Cottenham in the case of *Simpson v. Lord Howden*.” This undoubtedly is the rule in this country.⁸

Redemption of Mortgages.

90. PERSONAL MORTGAGES. — By the statutes of Massachusetts,⁹ whenever, upon a tender of the amount due on

¹ To the same effect are *Sample v. Barnes*, 14 How. 70; *Creath's Adm'r v. Sims*, 5 How. 192. 18; *Jackman v. Mitchell*, 13 Ves. 581.

² [*Munson v. Munson*, 28 Conn. 582; *Lick v. Ray*, 43 Cal. 83; *Head v. James*, 13 Wis. 641; *Briggs v. Johnson*, 71 Me. 235; *Crane v. Randolph*, 30 Ark. 579; *Venice v. Woodruff*, 62 N. Y. 462. *Contra*, *Almony v. Hicks*, 3 Head, 39.] ⁴ *Hamilton v. Cummings*, 1 Johns. Ch. R. 517.

⁵ 6 Peters, 95.

⁶ 3 My. & Cr. 97. *Smyth v. Griffin*, 13 Sim. 245, is to the same effect.

⁷ L. R. 8 Ch. App. 22.

⁸ *Anthony v. Valentine*, 130 Mass. 119.

⁹ *Bromley v. Holland*, 7 Ves. 2, 119.
⁹ Pub Stats. ch. 192, § 6.

the mortgage, the mortgagee refuses to deliver the chattel mortgaged, the mortgagor may recover the same by a writ of replevin. It is probable that a similar provision exists in other States.

If the thing mortgaged is tangible property subject to replevin, then the mortgagor has a remedy at law. He has only to tender the amount due, and, if return of the property is refused, to replevy it. And it was so held in *Gordon v. Clapp*.¹ In that case the mortgagor contended that there was consideration only in part for the notes given and outstanding, and he brought a bill in equity to redeem; but the court held that the mortgagor was bound to tender only the amount due, and if he did that he was entitled to replevy, and, by consequence, that proof that less than the full amount was then due, or proof of the failure in part of the consideration, was admissible in the suit at law.

This is a rather rigid view, for two reasons: (1) If the mortgagor under any honest mistake fails to tender the full amount due, his action at law fails, and he must begin again. Under the same circumstances, in a bill in equity, if the plaintiff offers to pay whatever is due, this tender is sufficient, and the court will give him a decree for redemption upon his paying the exact amount due; (2) Nor is a writ of replevin, which requires a bond and two sureties, a "plain" remedy.

91. But if the chattel mortgaged is intangible, an incorporeal right, and therefore not the subject of replevin nor capable of manual delivery, equity will entertain a suit to redeem, in case the mortgagee refuses to reconvey the property; and for this reason: as the right is an incorporeal one, the only proper evidence of title is a written instrument, and therefore a court of equity will compel the mortgagee to execute a written release or reconveyance in order that the mortgagor may have a clean title. This question arose and was decided in *Boston & Fairhaven Iron Works v. Montague*.² The thing mortgaged was a patent. Of course the title to it was not capable of replevin or of manual delivery, and a reconveyance therefore was necessary, and upon this ground the court entertained the bill to redeem.

¹ 111 Mass. 22.

² 108 Mass. 248.

92. In Massachusetts, and commonly elsewhere, the doctrine as to mortgages of personal property stands thus: 1st. If the thing mortgaged is tangible property, capable of manual delivery and replevin, the mortgagor cannot go into equity to redeem it, but must tender the amount due, at his risk, and then bring a writ of replevin. 2d. If the thing mortgaged is an intangible right or interest, such as a patent, the title to which must exist in some writing, the mortgagor has relief in equity.

93. REDEMPTION OF MORTGAGES OF REAL ESTATE. — Equity invariably takes jurisdiction of suits to redeem mortgages of real estate, because there is no adequate remedy at law. Ownership of real estate stands upon a written title or instrument, actual or presumed. So long as a mortgage is outstanding, it is a blemish on the title. Courts of equity will therefore entertain jurisdiction in order to compel the mortgagor to release the mortgage, or will order the decree itself to stand as a written discharge of it.¹

¹ See *infra*, p. 361 *et seq.*

CHAPTER V.

CONCURRENT JURISDICTION (CONCLUDED).

94. ASSIGNMENT OF CHOSSES IN ACTION. — Another important application of the rule, that equity will not take jurisdiction where there is ample remedy at law, arises in the case of the assignment of choses in action. For the purposes of this rule, a chose in action may be defined as any claim or demand, not negotiable in its character, which one person has against another.

A negotiable promissory note, the right to sue upon which passes to every holder, is certainly a chose in action ; but our subject relates to those choses in action which are non-negotiable, and the assignment of which does not confer any right upon the assignee to sue at law in his own name.

A non-negotiable note, a simple debt due from A to B for goods sold or labor done, the amount due under a policy of insurance after loss has occurred, are familiar examples of this great class of choses in action. The assignment confers upon the assignee an equitable title to the debt or demand, but it does not transfer to him the legal title, because it was not of a negotiable character ; and therefore the assignee can never sue at law upon it in his own name (the legal title not being in him), but he must sue in the name of the original and legal owner, the assignor. Now this circumstance (*i. e.* the disability of the assignee to sue at law in his own name, coupled with the fact that he has an equitable title to the debt) has sometimes led to the inference that he is entitled to sue in equity. And so great a judge and learned a writer as Judge Story¹ has stated the general rule to be “that wherever an assignee has an equitable right or interest in a debt or other property (as the assignee of a debt certainly has), there a court of equity is the proper forum to enforce it.”

¹ 2 Story's Eq. J. § 1057.

95. It is certain that this is not the law either in England or in this country. It is now well settled that the assignee of a strictly legal right, or chose in action, cannot maintain a bill in equity to recover it, but his remedy is by a suit at law in the name of the assignor.¹ If the original creditor, the assignor, could not have maintained a bill in equity, mere assignment of his claim does not transfer to his assignee any greater right. The latter succeeds only to such right as the assignor had.

Otherwise a court of chancery would be turned into a court for the collection of simple debts, for a creditor by merely assigning his claim could give his assignee the right to sue in equity to collect it. The remedy at law in the name of the assignor is sufficient, for two reasons: (1) Such assignment invests the assignee with a right to bring a suit at law in the name of the assignor; and (2) After notice of such assignment to the debtor, neither debtor nor creditor can do anything to impair the equitable right and interest of the assignee in the claim or debt. No payment by the debtor to the original creditor, and no release given by the creditor to the debtor after the assignment, are good as against the assignee, and they will have no more effect at law than they would have in equity.² Therefore the equitable interest of the assignee is fully protected at law.

96. This principle is well settled, namely, that nothing can be done by the creditor or the debtor, after notice of the assignment, to affect the rights of the assignee.³

The leading case upon this subject in England is *Hammond v. Messenger*.⁴ The United States Supreme Court have stated the rule as follows in *New York Guaranty Co. v. Memphis Water Co.*:⁵ "An assignee of a chose in action, on which a complete and adequate remedy exists at law, cannot, merely because his interest is an equitable one, bring a suit

¹ [Winch v. Keeley, 1 T. R. 619; Conway v. Cutting, 51 N. H. 407; Chicago R. R. v. Nichols, 57 Ill. 464; Carter v. United Ins. Co. 1 Johns. Ch. 463; Adair v. Winchester, 7 Gill. & J. 114.]

Briggs v. Dorr, 19 Johns. 95.]

² Walker v. Brooks, 125 Mass. 241; Eaton v. Mellus, 7 Gray, 566; Brown v. Maine Bank, 11 Mass. 153.

³ [Master v. Miller, 4 T. R. 320; Edwards v. Parkhurst, 21 Vt. 472;

⁴ 9 Sims, 327.

⁵ 107 U. S. 205.

in equity for the recovery of the demand. He must bring an action at law in the name of the assignor to his own use. This is true of all legal demands standing in the name of a trustee, and held for the benefit of *cestuis que trust*.”¹

In *Walker v. Brooks*² will be found a learned review of the subject, showing that the statement of Judge Story, which I have just quoted, is erroneous and unsupported by the English cases, and concluding as follows: “In this Commonwealth the assignee of a chose in action has an adequate and complete remedy at law in the right to maintain an action thereon in the name of his assignor, or of his executor or administrator, without his consent, and even against his protest, at least upon giving him, if seasonably demanded, a bond of indemnity against costs.”

97. I have thus endeavored to pass in review the principal points upon this important subject, with the leading cases bearing upon each point. Let us sum up the whole in the following nine propositions:—

(1) There is no jurisdiction in equity where the only relief which equity can give is the same both in kind and degree as can be had at law.³

Instances of this are all suits merely to recover damages for breach of contract, or to recover the amount due under a contract. On the other hand, whenever the relief sought is different in kind or degree from what a court of law can give, the jurisdiction is clear.

(2) Equity will invariably take jurisdiction of cases for the specific performance of contracts for the sale of real estate, because it is invariably presumed that the acquisition of the particular property in question was the motive of the contract.

(3) Equity will take like jurisdiction in suits for specific performance of contracts for the sale of personal property, (a) where the nature of the property indicates that the possession of that particular thing was the object of the contract; or (b) where it is not certain that the vendee can obtain in the market at any time a similar article with the damages which a court of law would give him.

¹ To the same effect, *Hayward v. Andrews*, 106 U. S. 672.

² 125 Mass. 241.

³ *Jones v. Newhall*, 115 Mass. 244.

(4) By the well-settled law of England and of Massachusetts, all contracts for the sale of shares in joint-stock corporations will be enforced specifically in equity. But in the courts of the United States this is an open question, except so far as the court is bound by the decision of Mr. Justice Miller in *Ross v. Union Pacific Railway Company*.¹

(5) Whenever a vendor is insolvent, and the vendee has paid the consideration price, and the property is still in the control of the vendor, or of those claiming under him with notice, equity will compel the specific delivery of the property.

So, also, will it compel the restoration of personal property fraudulently obtained, which cannot be replevied.

(6) Whenever a claim or defence is as available at law as in equity, and the party has an immediate opportunity to avail himself of it at law, equity will not take jurisdiction. This proposition includes all cases of deeds and other instruments void for fraud or other reason, where the party has an immediate opportunity to contest their validity in a suit at law, either as plaintiff or defendant.

(7) Whenever, on the contrary, an instrument is outstanding which is void for fraud or other cause not apparent on its face, and no present opportunity exists to establish its invalidity at law, equity will take jurisdiction.

(8) The assignee of a merely legal title, or of a chose in action, must sue at law in the name of the assignor, and not in equity.

(9) In all cases where the object of the suit is to prevent great and irreparable injury, equity will take jurisdiction, and will not leave the party to his remedy at law.

There are two topics immediately related to the preceding subject which I shall next briefly consider.

Where the Ground for Equitable Relief fails.

98. An important rule applicable to all cases of concurrent jurisdiction where the subject-matter is cognizable at law, but the jurisdiction of equity is invoked on the ground that it can afford special relief, is the following:—

¹ 1 Woolworth C. C. R. 26.

In causes of concurrent jurisdiction, if the case for the special equitable relief fails for any reason, the court will not proceed with the suit, but will remit the party to his remedy at law.¹ In other words, where a cause of action cognizable at law is entertained in equity on the ground of some equitable relief sought by the bill, which it turns out cannot, for defect of proof or other reason, be granted, the court is without jurisdiction to proceed further, and should dismiss the bill without prejudice.²

99. Thus, although a court of equity upon a bill for discovery may, where discovery is obtained, go on and give relief, notwithstanding the claim is purely a legal one,³ yet, if no discovery has been obtained from the defendant, it will not do so. This was settled in *Russell v. Clark's Ex'rs.*⁴ In that case Chief Justice Marshall said: "If the answer of the defendant discloses nothing, . . . the established rules limiting the jurisdiction of courts require that the plaintiff should be dismissed from the court of chancery, and permitted to assert his rights in a court of law."

100. In *Dowell v. Mitchell*⁵ the surviving member of a firm had given partnership notes for a debt of the firm, and also a mortgage on an estate which (as it turned out) never belonged to the firm, but had been the property of a deceased partner. A bill to foreclose was brought against the surviving partner and the heirs and administrator of the deceased partner. The United States Circuit Court dismissed the bill as to the foreclosure, but gave a decree for the amount of the notes against the surviving partner and the administrator. On appeal the United States Supreme Court said:

¹ [Price's Candle Co. v. Bauwen's Candle Co. 4 Kay. & J. 727; Bailey v. Taylor, 1 Russ. & M. 73; Ferguson v. Waters, 3 Bibb. 303; Viele v. Hoag, 24 Vt. 46.]

² Dowell v. Mitchell, 105 U. S. 430

³ [This subject is discussed in 1 Pomeroy's Eq. § 223. It is a general principle that when equity once assumes jurisdiction it will give full

relief. Alden v. Trubee, 44 Conn. 455; McDaniel v. Lee, 37 Mo. 204; Schollenberger's Appeal, 21 Pa. St. 337, 340; Billups v. Sears, 5 Grattan, 31; Rathbone v. Warren, 10 Johns. 587, 596; Traip v. Gould, 15 Me. 82; Peoria v. Johnston, 56 Ill. 45; Mott v. Oppenheimer, 135 N. Y. 312.]

⁴ 7 Cranch, 69.

⁵ 105 U. S. 430.

"When this fact [*i. e.* that title never was in the firm, and therefore the mortgage was void] was established by the evidence, the court below, sitting as a court of equity, had no jurisdiction to proceed in the cause. There was nothing on which it could act but the promissory notes, and to enforce their payment the complainants had a plain, adequate, and complete remedy at law."

In *Rogers v. Durant*¹ there was a bill to recover the amount due on certain drafts alleged to have been accepted by the defendants, and to have been lost. The court held that there was no sufficient proof of loss, and therefore no remedy in equity. "There being no sufficient evidence of loss, there can be no doubt that the case is one within the exclusive jurisdiction of a court of law."

101. There is an important qualification or exception to the rule stated above, that where the special ground for equity relief fails, the plaintiff will be remitted to his remedy at law. That qualification relates exclusively to bills for the specific performance of contracts. (1) It is the rule both in England and in this country that if, upon a bill to enforce a contract for the conveyance of property, the defendant has *pendente lite* rendered it impossible for him to perform the contract by a transfer of the property to a third person, a court of equity will invariably, at the plaintiff's election, retain the bill and give the plaintiff relief in damages.

102. (2) If the defendant had thus disqualified himself to perform his contract before the suit was brought, but the plaintiff was ignorant thereof and brought his bill in good faith, then by the earlier English rule, and by the present well-settled rule in Massachusetts and other States, a court of equity will retain the bill and give relief in damages.² Some later decisions in England were to the effect that equity would not proceed in such a case, but would leave the plaintiff to his remedy at law for damages.

¹ 106 U. S. 644.

232 ; *Borden v. Curtis*, 48 N. J.

² [*Gibbs v. Champion*, 3 Ohio, Eq. 120. See, also, *Case v. Minot*, 335 ; *Churtier v. Marshall*, 56 N. H. 158 Mass. 577.]
478 ; *Hamilton v. Hamilton*, 59 Mo.

However, by Stats. 21 & 22 Vict. (ch. 27, § 2), growing out of the conflict in the English cases, a court of equity is authorized, "if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance; and such damages may be assessed in such manner as the court shall direct."

103. (3) If the defendant has thus incapacitated himself, to the knowledge of the plaintiff, before suit is brought, equity will not take jurisdiction.¹ There can be no question about this rule.

To repeat:—

(1) If the defendant has conveyed the property after suit brought, equity will retain the bill and give the plaintiff relief in damages.

(2) If such transfer was made before suit, but was unknown to the plaintiff, equity will retain the suit.

(3) If the plaintiff knew before bringing his bill that the defendant had transferred the property, his bill will be dismissed.²

Objection to the Jurisdiction, how Taken and Waived.

104. The second topic is, What is the proper mode of objecting to equity jurisdiction on the ground that there is a sufficient remedy at law; and can this objection be waived?

There is no contrariety of opinion as to the proper, formal method in which this objection should be presented. It may be by demurrer, but according to the present practice it may be included in an answer to the merits.

105. But suppose the defendant answers the bill without presenting this objection in any form in his pleadings, is it waived, or must the court itself take notice of it? Upon this point there is a diversity of opinion. In England and in the United States Supreme Court it is settled by repeated decisions that this is an objection which cannot be waived,

¹ [Hatch v. Cobb, 4 Johns. 559; Milkman v. Ordway, 106 Mass. 232. McQueen v. Choteau, 20 Mo. 222; See, also, Wonson v. Fenno, 129 Hurlbut v. Kantzler, 112 Ill. 482.] Mass. 405. [Pomeroy's Eq. § 237,

² For a good review of the cases 1410.]
establishing these propositions, see

because it goes to the jurisdiction, and the court is bound to take notice of it, *sua sponte*, although it is not presented in the pleadings, nor even suggested orally by counsel. In several cases the United States Supreme Court have, upon appeal, dismissed the bill upon this ground, although the objection was not raised by the pleadings or by counsel.¹

In *Lewis v. Cocks*² they say: "In the present case the objection was not made by demurrer, plea, or answer, nor was it suggested by counsel; nevertheless, if it clearly exists, it is the duty of the court, *sua sponte*, to recognize it and give it effect. It is the universal practice of courts of equity to dismiss the bill if it be grounded upon a merely legal title. In such case the adverse party has a constitutional right to a trial by jury." The rule in England is the same as that of the United States Supreme Court. It was so laid down in *Foley v. Hill*,³ where the argument of counsel states that no objection to the jurisdiction was raised in the answer.

106. On the contrary, in Massachusetts it is settled by numerous cases that the objection, that the plaintiff has an adequate and complete remedy at law, can be waived by the defendant, and that failure to set up the objection by demurrer, answer, or plea constitutes such a waiver.⁴ That court has gone much further. It has held that, although the defendant's answer included a demurrer to the plaintiff's bill for want of equity (*i. e.* a demurrer on the ground that the plaintiff had an adequate remedy at law), yet that such objection was waived if not insisted upon by counsel at the hearing before a single judge, and that it is not open to the

¹ [Oelrichs v. Spain, 15 Wall. 211; Mills v. Knapp, 39 Fed. Rep. 592; Hughes v. Jones, 2 Md. Ch. 178.]

² 23 Wall. 466.

³ 2 H. L. Cases, 28.

⁴ Jones v. Keen, 115 Mass. 170; Tarbell v. Bowman, 103 Mass. 341; Creely v. Bay State Brick Co. 103 Mass. 514; First Congregational Society in Raynham v. Trus-

tees of Fund in Raynham, 23 Pick. 148; Massachusetts General Hospital v. State Mutual Life Assurance Co. 4 Gray, 227. [The following decisions are in harmony with the Massachusetts rule: Grandin v. Leroy, 2 Paige, 509; Stout v. Cook, 41 Ill. 447; Rees v. Smith, 1 Ohio, 124; Niles v. Williams, 24 Conn. 279; Tenney v. State Bank, 20 Wis. 152.]

defendant upon the hearing before the full court upon appeal.¹

107. There is one qualification of this Massachusetts rule. If the subject-matter of the bill is one of which a court of equity cannot properly have jurisdiction under any circumstances, then I apprehend that no court would hold that the objection could be waived.²

There are many subjects, as we have seen already, of which a court of equity has concurrent jurisdiction with a court of law, according to the particular circumstances of the case or the peculiar relief sought for. The Massachusetts doctrine, that an objection to the jurisdiction may be waived, must be confined to cases of this description, namely, where the subject-matter is not of such a nature as necessarily to exclude the jurisdiction of a court of equity under all circumstances ; and the rule will never be applied by any court to a case where the subject-matter upon its face is one of which courts of law have exclusive jurisdiction. For instance, contracts, fraud, nuisance, account, are subjects of which a court of equity has concurrent jurisdiction with a court of law ; *i. e.* it will take jurisdiction over them, not in all cases, but under special circumstances calling for equitable relief. But actions for slander or for assault and battery are bald examples of cases where a court of equity never by any possibility can have jurisdiction. In such cases, therefore, the objection to the want of jurisdiction cannot be waived. No court of equity would ever entertain a bill for assault and battery on the ground that the defendant did not see fit to object to the jurisdiction, and therefore waived it. On the other hand, as fraud, nuisance, account, are subjects of which a court of equity may have jurisdiction under certain circumstances, there is more ground for saying that in such cases the objection that the particular case does not call for equitable interference, may be waived.

¹ Page *v.* Young, 106 Mass. 313; 2 McCord Ch. 130, 133; Tenney *v.* [Dodge *v.* Wright, 46 Ill. 382.] State Bank of Wis. 20 Wis. 152 ;

² [Hawley *v.* Cramer, 4 Cowen, Crawford *v.* Schmitz, 139 Ill. 564 ; 717, 727 ; McDonald *v.* Crockett, Niles *v.* Williams, 24 Conn. 279.]

108. The conclusion then, I think, must be (1) that a court of equity will never take jurisdiction of a matter which is within the exclusive jurisdiction of courts of law, on the ground that the objection to its jurisdiction has been waived; no waiver of jurisdiction in such a case can be made: (2) where the subject-matter of the bill is one of which courts of equity have concurrent jurisdiction with courts of law, the objection that equity has not jurisdiction in the particular case (because the plaintiff has a sufficient remedy at law) cannot be waived except in Massachusetts, and here it is waived if not set up in the pleadings, and insisted upon at the first hearing.

Upon principle, as it seems to me, the rule as adopted in England and by the United States Supreme Court is right, and that of the Massachusetts court is wrong. It is an ancient and sound maxim in the law, that consent can never confer jurisdiction.¹ Consent may waive errors, but it cannot create jurisdiction.

109. A party may waive errors, *i. e.* whatever is of mere personal right. For example, a party is entitled to certain notice before being obliged to appear and make answer to a suit. Nevertheless, although insufficient notice has been given, yet if the defendant voluntarily appears and answers, making no account of the defect in service, he will be deemed to have waived the objection. The right is a strictly personal one which he is at liberty to insist upon or to waive, and his subsequent conduct in appearing and answering is properly held to be a waiver.

But no party, by his action or neglect to act, can increase or diminish the jurisdiction of a court. That jurisdiction is defined by the law which created the court, and no consent of parties can add to or take from it.

¹ [Ohio River Ry. Co. v. Gibbens, 35 W. Va. 57.]

CHAPTER VI.

MAXIMS.

110. THERE are certain general principles or maxims which, if they do not lie at the foundation, nevertheless constitute an important element in equity jurisprudence, and are of continual use in its practical administration. It is therefore necessary that we should understand them.

EQUITAS SEQUITUR LEGEM (equity follows the law).

Since one great province of equity (as we have seen) is to recognize and give effect to rights of which a court of law cannot take cognizance, it is apparent that this maxim can be true only in a limited sense.

All positive rules of law, whether of statute or of common law, are as obligatory upon courts of equity as upon courts of law, whenever the matters to which those rules apply are in question.¹ Thus the law of England declares that the eldest son shall take by descent the whole undivided estate of his father. In all cases in which that title is set up, courts of equity must give effect to it equally with courts of law. The law of Massachusetts provides that a will must be attested by three subscribing witnesses. This is as binding in equity as at law. "A court of equity has no more jurisdiction than a court of law to recognize and give effect to instruments inoperative for want of compli-

¹ [Stone v. Gardner, 20 Ill. 304; Matthews v. Mobile Insurance Co. 75 Ala. 85. In some early cases this principle was carried to a great length. According to the common law, a man by the fact of marriage became responsible for his wife's debts, this liability ceasing upon her death. In one case a woman brought her husband a large fortune, but after her death her creditors could not sue the husband at law; and inasmuch as equity was held to follow the law in this particular, the creditors had no remedy, and the husband remained in undisturbed possession of the estate. Heard v. Stanford, Cases temp. Talbot. 173.]

ance with a condition made by statute prerequisite to their validity.”¹

The law merchant requires that, in order to charge an indorser of a promissory note, due demand must have been made upon the maker, and notice must have been given to the indorser. A court of equity cannot dispense with this rule any more than a court of law. Illustrations might be multiplied indefinitely. They all come to this, that, whenever legal rights are the subject of inquiry or are involved in a court of equity, the common or positive law furnishes the rule of decision.

111. The second particular in which this maxim is true is, that the same rules of construction and interpretation of instruments apply in equity as at law.² It has sometimes and very loosely been said that a court of equity adopts a more liberal rule in the construction of written instruments than a court of law. But there is no foundation in principle for any such distinction, and by the better authorities none in fact exists.

No possible reason can be assigned why a written contract should mean one thing in a court of equity and a different thing in a court of law. There is but one rule for both courts, and that is, to extract from “the four corners of the instrument” the intention of the parties. Their meaning must be found in what they have said, and the same words must have the same meaning, whether interpreted by a chancellor or by a judge. “There is no equitable construction of a contract or duty different from the legal one.”³

112. The third particular in which equity follows the law is, that it is bound by the same rules of evidence. There are two exceptions to this rule. At law every instrument must stand as it is written, and parol evidence is not admissible to alter it. But in equity (and this is the first exception), when the purpose of the bill is to correct an instrument, on the ground that by accident or fraud it is not written as the

¹ Townsley v. Chapin, 12 Allen, 476.

³ Merriam v. Boston, Clinton, &c. R. R. 117 Mass. 241.

² [Hedges v. Dixon County, 150 U. S. 182.]

parties agreed that it should be, it is competent to show by parol evidence what the agreement was.

The second exception is, that, to a bill brought for the specific performance of a written contract, it is always competent to show in defence by parol evidence that there is error in the written instrument, and that it does not conform to the real agreement of the parties.

But in other respects the rules of evidence are common to both courts; and, except in the particulars named (*i. e.* where the purpose of the bill is to reform an instrument or to enforce it), the rule which excludes parol evidence to alter the terms of a written instrument "is applied with the same force and effect both in law and in equity."¹

"To alter written contracts by parol evidence cannot be done in equity any more than at law, in the absence of fraud or mistake."²

In *Willard v. Tayloe*³ there was a bill to enforce a conveyance of real estate. The defendant testified that the plaintiff said that the agreement for sale "should go for nothing." This evidence was held inadmissible. "When parties have reduced their contracts to writing, conversations controlling or changing their stipulations are, in the absence of fraud, no more received in a court of equity than in a court of law."

And the same is true of all other rules as to the competency of testimony.

113. The fourth respect in which this maxim applies is in reference to the statutes of limitation.⁴

In England, and probably in every one of the United States, a statute of limitations has been adopted, fixing a period within which suits must be brought to recover either real or personal estate, debts, or other claims, and damages for injury either to person or to property. The important inquiry thereupon arises, What effect, if any, has the statute

¹ *Anthony v. Valentine*, 130 Mass. 119; *Hunt v. Rousmanier*, 8 Wheat. 174, 211; *Sprigg v. The Bank of Mount Pleasant*, 14 Pet. 201; [*Van Horn v. Van Horn*, 49 N. J. Eq. 327.]

² *Curtis, J., in Hendrickson v. Hinckley*, 17 How. 443.

³ 8 Wall. 557, 573.

⁴ [*Smith v. Wood*, 42 N. J. Eq. 563; *Reynolds v. Sumner*, 126 Ill. 58; *Hutcheson v. Grubbs*, 80 Va. 251. See cases *infra*.]

of limitations upon suits in equity? It is true of the English statute, and probably of many of the state statutes, that suits in equity are not expressly included therein. Are, then, courts of equity independent of the statutes of limitation?

Lord Redesdale, in *Hovenden v. Annesley*,¹ answered that question by saying that courts of equity "are not within the words of the statutes, because the words apply only to particular legal remedies; but they are within the spirit and meaning of the statutes, and have been always so considered."

114. The Supreme Judicial Court of Massachusetts, in view of the fact that the statute of limitations existed in this State before any remedies in equity were provided by statute here, came to the conclusion that the legislature did not intend to exempt courts of equity from the application of the statute, and consequently that "the statute operates with us *ex vigore suo* in equity as well as at law, and not by the discretion or courtesy of the courts."²

In *Dodge v. Essex Insurance Company*³ the doctrine is thus stated: "In England courts of equity do not hold themselves absolutely barred by the provisions of the statute of limitations. They adopt it only as a rule by which to guide the exercise of their discretion. In the courts of chancery in this country it is otherwise. Full force and effect are given to the statute in equity as at law. It operates on equitable proceedings, *suo vigore*, and not as a rule of comity or as a measure of judicial discretion."

115. This statement is not precisely accurate, at least so far as the Federal courts are concerned. The rule, as generally applied both in England and in this country, is as follows:—

(1) "Courts of equity, in cases of concurrent jurisdiction, consider themselves bound by the statutes of limitation which govern courts of law in like cases, and this rather in obedience to the statutes than by analogy."⁴

¹ 2 Sch. & Lefr. 607, 629.

³ 12 Gray, 65, 71.

² Farnam v. Brooks, 9 Pick. 212, 243.

⁴ Badger v. Badger, 2 Wall. 87, 94; Hovenden v. Lord Annesley, 2

Examples of concurrent jurisdiction are account, nuisance, and all cases where a strictly legal title or right is involved.

(2) In all cases where the jurisdiction in equity is exclusive, as, for instance, in reference to purely equitable titles or interests, courts of equity act in analogy to the statute of limitations, and, although not absolutely bound by it, they feel it their duty to follow it.¹ For example, where an action upon a legal title to land would be barred, say in twenty years, courts of equity will apply a like limitation to suits founded upon an equitable title to the same property.²

116. WHEN DOES THE EQUITABLE BAR BEGIN TO RUN? — An important consideration is not to be overlooked in this connection. A court of equity never imputes fault or laches to a party who, without negligence on his part, is ignorant of the facts which create an equitable title or interest in his favor; and therefore time does not begin to run against such a claim in equity until the facts are known, or ought to have been known, by the party in whose favor they exist.³

For example, let us suppose that an agent appointed to sell property for A has fraudulently conspired with B to convey the property to him at an unfair price, with the agreement that B should sell it again at an advanced price, and then share with the agent the profits of the transaction. Here the right of A against his agent and B arose as soon as the fraudulent transaction was completed, yet practically he has no claim until he has knowledge of the fraudulent

Sch. & Lef. 607; *Godden v. Kim-mell*, 99 U. S. 201, 210; *Moore v. Greene*, 2 Curtis C. C. R. 202; *Hall v. Russell*, 3 Sawyer, 506, 515; [*German - American Seminary v. Kiefer*, 43 Mich. 105; *Relf v. Eberly*, 23 Iowa, 467; *Murray v. Coster*, 20 Johns. 576; *Agens v. Agens*, 50 N. J. Eq. 566.]

¹ [*Stackhouse v. Barnston*, 10 Ves. 453, 466; *Miller v. McIntyre*, 6 Peters, 61; *Kane v. Bloodgood*, 7 Johns. Ch. 90; *Neely's Appeal*, 85 Pa. St. 387; *Armstrong's Heirs v. Campbell*, 3 Yerg. (Tenn.) 201.]

² *Elmendorf v. Taylor*, 10 Wheat. 152; *Miller v. McIntyre*, 6 Peters, 61; *Beaubien v. Beaubien*, 23 How. 190, 207; *Cholmondeley v. Clinton*, 2 Jac. & W. 1.

³ [*Cowper v. Cowper*, 2 P. Wms. 720, 753; *In re Crosley*, L. R. 35 Ch. D. 266; *Jones v. Van Doren*, 130 U. S. 684; *Lincoln v. Judd*, 49 N. J. Eq. 387; *Phalen v. Clark*, 19 Conn. 421; *Sears v. Shafer*, 6 N. Y. 268; *Munson v. Hallowell*, 26 Tex. 475; 2 *Pomeroy's Eq.* § 917. *Contra*, at law, *Troup v. Smith*, 20 Johns. 33.]

conduct of his agent with B; and therefore the period at which time begins to run against him in a court of equity is the date when he first knew, or ought by reason of proper diligence to have known of the fraudulent character of the sale.

Where the claim is founded on the fraud of another "the length of time during which the fraud has been successfully concealed and practised is rather an aggravation of the offence, and calls more loudly upon a court of equity to give ample and decisive relief."¹

So apparent is the justice of this rule that it is almost universally adopted as a qualification in all statutes of limitation, the provision being that, in cases of fraudulent concealment of a claim, the period of limitation does not begin to run until discovery of the claim by the person entitled thereto.²

117. (3) THE PLAINTIFF MUST ALLEGE AND PROVE CONCEALMENT.³ — To avoid the effect of lapse of time, the plaintiff must make it clear that he was kept in ignorance of the claim without his own fault. The rule as stated in *Badger v. Badger*,⁴ by Mr. Justice Grier, has frequently been cited and approved: —

"The party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim, how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance, and how and when he first came to a knowledge of the matters alleged in his bill."

118. To repeat, the four leading principles on this subject are: —

1st. Whenever a legal title or claim is in controversy, equity follows the rule prescribed by the common or statute law.

¹ Story, J., in *Prevost v. Gratz*, 6 C. C. 390; *Martin v. Smith*, 1 Dill. Wheat. 481, 498. C. C. 85; *Cole v. McGlathry*, 9

² Mass. Pub. Stats. ch. 197, § 14. Green'f, 131; *Lewis v. Welch*, 47

³ [*South Sea Co. v. Wymondsell*, Minn. 193; *Boomer v. French*, 40 3 P. Wms. 143; *Bree v. Holbech*, Iowa, 601.]

Doug. 654; *Carr v. Hilton*, 1 Curtis ⁴ 2 Wall. at p. 95.

2d. The rules of equity for construing written instruments are the same as the rules of the common law.

3d. Equity is governed by the same rules of evidence as are the courts of common law, except in the two instances of a bill to reform a written contract and a bill to enforce a written contract, in which cases oral evidence is admissible to show mistakes in the instrument.

4th. Equity adopts and is governed by the statutes of limitation.

119. WHERE THE EQUITIES ARE EQUAL THE LAW WILL PREVAIL. — This is closely allied to the preceding maxim. It means that as between two contending parties who have equal equities, that is, equal claims to the consideration of a court of equity, if in addition thereto either has also the legal title to the property in dispute, that title shall prevail.¹

One or two illustrations will show the meaning and scope of the rule. A makes a contract with B for the sale of an estate. On the same day he makes a similar contract with C, who has no notice of the former contract with B. On some subsequent day he makes the transfer to C. Both B and C are equally entitled to a specific performance of their contracts. But, C having the legal title, that must prevail as between B and C. Again, B fraudulently obtains a conveyance from A, and immediately sells to an innocent purchaser, C. Here the equities of A and C are equal; but as C has also the legal title, that title will prevail and he will retain the estate.² The protection which a court of equity universally affords to an innocent purchaser without notice stands upon this principle, that, where the equities of the case are equal, the law, that is, the legal title, must prevail.³

¹ ["The defendant has an equal claim to the protection of a court of equity for his title as the plaintiff has to the assistance of the court to assert his title, and the court will not interpose on either side; for the equities are equal between persons equally innocent and equally

diligent." Story's Eq. vol. i. p. 63, 13th ed.; *Maina v. Elliott*, 51 Cal. 8; *Pratt v. Clemens*, 4 W. Va. 443; *Town of St. Johnsbury v. Morrill*, 55 Vt. 165.]

² [*Thorndike v. Hunt*, 3 De G. & J. 563.]

³ [*Bassett v. Nosworthy*, Cas.

120. HE WHO SEEKS EQUITY MUST DO EQUITY.¹— This is an important and fundamental rule. It means that whoever seeks relief in equity must be ready, and must offer, to do on his part whatever the equities of the case may require; and he must not attempt to shield himself behind any merely legal or technical advantage.

The most common illustration of this rule is found in that class of cases (frequently occurring in England, but seldom in this country) where relief is sought on behalf of improvident young men, spendthrifts, against hard and usurious bargains driven with them by money-lenders. In all these cases equity requires that the plaintiff shall offer to pay the proper amount due.²

121. Another important example is where a husband asks the aid of a court of equity to obtain possession of his wife's

temp. Finch, 102; *Jerrard v. Saunders*, 2 Ves. 454; *Vattier v. Hinde*, 7 Peters, 252; *Wood v. Mann*, 1 Sumner, 506; *Newton v. McLean*, 41 Barb. 285; *Carlisle v. Jumper*, 81 Ky. 282. See *infra*, p. 508, as to *bonâ fide* purchasers.]

¹ [*Hanson v. Keating*, 4 Hare, 1; *McLaughlin v. McLaughlin*, 20 N. J. Eq. 190; *Mumford v. American Life, &c. Co.* 4 N. Y. 463, 482; *Phillips v. Phillips*, 50 Mo. 603; *Loney v. Courtney*, 24 Neb. 580. Where the plaintiff asks for an account, the court may compel him to render one, so that the whole matter may be settled in one suit. *Clarke v. Tipping*, 4 Beav. 588. One who comes into equity for partition must contribute his share of a mortgage debt paid by his co-owner. *Campbell v. Campbell*, 21 Mich. 438. Upon a suit to enjoin the collection of a tax, no relief will be granted in equity unless the amount actually due is tendered. *Morrison v. Hershire*, 32 Iowa, 271. Where the plaintiff asks to have a tax deed set aside, he must pay all taxes

which the holder has paid. *Reed v. Tyler*, 56 Ill. 288. Plaintiff seeking to have a judgment set aside must tender the amount actually due. *Eaton v. Markley*, 126 Ind. 123; *Saxton v. Seiberling*, 48 Ohio St. 554; *Carlton v. Hulett*, 49 Minn. 308. By the equity asserted by the defendant must arise from the same subject-matter or transaction. *Comstock v. Johnson*, 46 N. Y. 615; *Finch v. Finch*, 10 Ohio St. 501; *Otis v. Gregory*, 111 Ind. 504.]

² [*Henkle v. Royal Exchange Ass. Co.* 1 Ves. Sen. 317; *Ballinger v. Edwards*, 4 Iredell Eq. 449; *Miller v. Ford*, 1 N. J. Eq. 358; *Corby v. Bean*, 44 Mo. 379; *Fanning v. Dunham*, 5 Johns. Ch. 122. But if the lender comes into court seeking to enforce the usurious contract, there will not be a decree even for the amount actually borrowed. All relief will be denied on the principle that "he who comes into equity must do so with clean hands." *Hart v. Goldsmith*, 1 Allen, 145; *Kahner v. Butler*, 11 Iowa, 419.]

property. By the common law, when a woman marries, all her personal property belongs to her husband. All of her choses in action which he can reduce to possession during coverture, without the aid of a court of equity, he may take and appropriate to himself. But if it becomes necessary for him to go into a court of equity to collect any of this property, equity will require him, as a prerequisite, to make a proper settlement out of the property in favor of his wife and children.¹

122. So, also, where one seeks the aid of a court of equity to enforce a title against a defendant in possession who has made improvements under the belief that he had a good title. Equity will aid the true owner only upon condition that proper compensation is made to the innocent holder for the benefit actually conferred upon the owner by the improvements.²

123. This rule, that he who seeks equity must do equity, has special application in bills for the specific performance of contracts. *Willard v. Tayloe*³ is a striking illustration. A contract made in 1854 for the lease of land provided that on the termination of the lease in 1864, the lessee might purchase the estate at a price named. In 1864 the Legal Tender Act was in existence, and the currency under that act was paper money worth little more than fifty cents on a dollar of coin. The court held that the contract was made in reference to the legal tender existing in 1854, which was gold, and that whether the Legal Tender Act was valid or not, nothing less than a tender of gold would be just and equitable under the circumstances; and, as the plaintiff had offered to do whatever the court should adjudge right in the matter, conveyance was decreed on his paying the amount in gold. The court said: —

¹ [Sturgis v. Champneys, 5 My. & Cr. 97; Kenny v. Udall, 5 Johns. Ch. 464; Tucker v. Andrews, 13 Me. 124; Duvall v. The Farmers' Bank, 4 G. & J. 282. See, also, p. 491.] [Bright v. Boyd, 1 Story, 478, 494; Jones v. Jones, 4 Gill, 87 note. The rule is applied to an insane person upon whose behalf a bill is brought to have a conveyance set aside. Evans v. Horan, 52 Md. 602.]

² Pub. Stats. Mass. ch. 173, §§ 17, 18; Pratt v. Thornton, 28 Me. 355; . ³ 8 Wall. 557, 574.

"The parties, at the time the proposition to sell embodied in the covenant of the lease was made, had reference to the currency then recognized by law as a legal tender, which consisted only of gold and silver coin. It was for a specific number of dollars of that character that the offer to sell was made; and it strikes one at once as inequitable to compel a transfer of the property for notes worth, when tendered in the market, only a little more than one half of the stipulated price. Such a substitution of notes for coin could not have been in the possible expectation of the parties. Nor is it reasonable to suppose, if it had been, that the covenant would ever have been inserted in the lease without some provision against the substitution. The complainant must therefore take his decree upon payment of the stipulated price in gold and silver coin. Whilst he seeks equity he must do equity."¹

124. "EQUITY TREATS THAT AS DONE WHICH OUGHT TO BE DONE."²—Equity will never allow a party to take advantage of his own wrong nor to profit by his own delay. This maxim has especial reference to agreements. A court of equity will assume an agreement to have been performed at the time when, according to its tenor, it ought to have been performed, provided that this assumption is necessary in order to preserve the rights of either party. Thus, in *Union Mutual Insurance Co. v. Commercial Mutual Marine Insurance*

¹ See, also, *Fosdick v. Schall*, 99 U. S. 235; [*Stark v. Coffin*, 105 Mass. 328.]

² [*Frederick v. Frederick*, 1 P. Wms. 710; *Craig v. Leslie*, 3 Wheaton R. 563; *Felch v. Hooper*, 119 Mass. 52, 57; *Brewer v. Herbert*, 30 Md. 301; *Jordan v. Cooper*, 3 Sar. & R. 564, 585; *Gardiner v. Gerrish*, 23 Me. 46. Where a testator directs that his real estate be sold, a court of equity will treat it as personal property. *Peter v. Beverly*, 10 Pet. 532. See, also, *Lorrillard v. Coster*, 5 Paige, 172, 218. Where there is an agreement to con-

vey land and the vendee dies, his right to a conveyance will be treated as real property which descends to his heirs. *Champion v. Brown*, 6 Johns. Ch. 398. Where all but one of several partners signed an account and valuation, that one having assented to their correctness, and having failed to sign them on account of illness, equity treated the transaction as if he had signed them. *Coventry v. Barclay*, 3 De G., J. & S. 320. Where there was an agreement to give a mortgage, the court considered it as given. *Daggett v. Rankin*, 31 Cal. 321.]

Co.¹ there had been an agreement to insure the plaintiff's property, but no policy had been issued. A loss occurred. On a bill to enforce the agreement and to recover for the loss, the court held that equity would consider that the policy was issued when it ought to have been issued; and it gave relief to the amount of the loss.

Another illustration is found in the case of money covenanted to be laid out in land, or of land covenanted to be sold. Upon the death of the covenantor before executing the agreement, the money or land is stamped with the alternative character, and descends to the heir or next of kin accordingly.

This maxim applies only in favor of one entitled to enforce the agreement, and not in favor of a mere volunteer, *i. e.* one who has no right to claim under the agreement.²

125. "EQUALITY IS EQUITY," or "EQUITY DELIGHTETH IN EQUALITY." — This maxim, in its general purpose, serves to express the idea that the predominant aim of equity is to work out exact justice, so far as this can be done.³ It has two important practical applications.

126. The first relates to the ownership of property. The rule which equity used to follow, in the absence of any express agreement, was that where two or more contributed in equal proportions to the purchase of property, they should own it as joint tenants. This rule was applied formerly even in the case of real estate; and persons contributing jointly to its purchase were held to be joint tenants, although one important incident of this joint tenancy was, that the survivor took the whole if the joint tenancy had not in the mean time been severed.⁴ In this country, however, the

¹ 2 Curtis C. C. R. 524.

² *Chetwynd v. Morgan*, L. R. 31 Ch. Div. 596; [*Burgess v. Wheate*, 1 Eden. 177, 186.]

³ [Where a power of appointment to distribute an estate among a certain class be given, and it is not exercised, equity will divide equally. *Salisbury v. Denton*, 3 Kay & J. 529.]

⁴ [Later, equity, not favoring

joint tenancies, seized upon any pretext to treat as a tenancy in common what would have been at common law a joint tenancy. *Rigden v. Vallier*, 2 Ves. Sr. 252, 258; *Duncan v. Forrer*, 6 Binney (Pa.), 193; *Petty v. Styward*, 1 Ch. Rep. 31; *Randall v. Phillips*, 3 Mason, 378; *Sugden on Vendors*, 902, 11th edition.]

doctrine of survivorship is not favored, and the disposition is, in all conveyances to two or more persons, to treat them as tenants in common, rather than as joint tenants. I think the rule which a court of equity would adopt here now would be to treat the parties as tenants in common.¹ I do not think, however, that equity can claim the sole credit of adopting the presumption of joint or common ownership from the equal contribution of payment. I have no doubt that under the same circumstances the same presumption would exist at common law.

127. The second and more important application of this maxim is to the case of joint sureties.² Where two or more persons become sureties for a principal debtor, the inflexible rule in equity is, that they enter into a common liability, — they embark in the same ship, and under no circumstances and by no artifice or circumlocution is one surety allowed to obtain any advantage over another. In this case the inviolable rule is, Equality is equity. And therefore, if one surety has been compelled to pay the whole debt to the creditor, all the other sureties must contribute and pay to him their respective shares.³

128. So, also, if the debtor has given to one surety any security (by way of mortgage or otherwise) to indemnify him against loss on account of his suretyship, all his co-sureties have a right to share equally in the benefits of this security. One surety cannot, by any agreement between himself and the principal debtor, gain an advantage over his co-sureties; and therefore, as is implied in what I have said, although the agreement between the debtor and the surety may have been that the security should be for his sole benefit and indemnity, equity will not allow any such unjust preference, and will require that the security shall be applied in equal proportions to all the sureties who have been compelled to pay the principal debt.

129. On the same principle, if the creditor releases one

¹ See Mass. Pub. Stats. ch. 126, §§ 5 and 6. [This rule of construction is now established by statute

² [This subject is fully treated *infra*, ch. 22.]

in most of the States. See Stimpson's Statute Law, 1371.]

³ [See Pomeroy's Eq. § 409.]

surety he thereby releases all the sureties. While equity (as we have seen) will guard the sureties from any unjust preference given by the debtor to one surety, so on the other hand it will guard them from any equally unjust attempts by the creditor to relieve one surety at the expense of the other sureties. If one be released, all are released, for equality in this instance is equity.

These rules are also to a great extent now recognized and applied at law.

Equity deals with the Individual.

130. Passing from maxims strictly, there is an important characteristic of equity jurisprudence next to be noticed; and that is, that in a peculiar sense a court of equity acts *in personam*. That is to say, it deals with the individual; it is his conscience, and compels him to do his duty in the specific case. And this it does without reference to the *situs* of the subject-matter of the controversy.¹

131. This power to deal with the person enables it to give relief in two very important instances :—

(1) Where equity has jurisdiction over the person of a defendant,—*i. e.* where he is within its jurisdiction, so that its process can be served upon him,—it will compel him to do his duty in reference to the transfer of property, real or personal, although the property itself may be in another State or jurisdiction.

At the common law, all actions for the recovery of real estate, or for damages for injury to real estate, must be

¹ [In an instructive case the Supreme Court of New Hampshire enjoined the defendant, a citizen of that State, from injuring the plaintiff's dam in Maine. *Great Falls, &c. Co. v. Worster*, 23 N. H. 462. A New Jersey court enforced a contract in regard to an island in the Caribbean Sea, and decreed an account in relation thereto. *Wood v. Warner*, 15 N. J. Eq. 81. A court of equity will compel a debtor to make discovery of his property outside the jurisdiction, and to bring it in, or to make an assignment of it. *Mitchell v. Bunch*, 2 Paige, 606. See, further, *Roper v. Roper*, 3 Tenn. Ch. 53; *Penn v. Hayward*, 14 Ohio St. 302; *Carroll v. Lee*, 3 Gill & J. 504; *McGregor v. McGregor*, 9 Iowa, 65; *Ewing v. Ewing*, L. R. 9 App. Cas. 34; *Muller v. Dows*, 94 U. S. 444; *Davis v. Morriss*, 76 Va. 21; *Carver v. Peck*, 131 Mass. 291; 3 Pomeroy's Eq. § 1318.]

brought in the State and in the very county in which the land lies. Now, when a case is presented to a court of equity in which it appears that the defendant is bound for any reason to make a transfer of the title of real estate to the plaintiff, the court can and will compel the defendant to do his duty in this particular, although the property itself is in some State or county other than that where the court is held.

132. I will mention two illustrations: If a person who has contracted to convey real estate is within the jurisdiction of the court, a court of equity will compel him to perform his contract by executing a proper conveyance, although the property itself lies in some other State. This doctrine is well settled at the present day.¹ The earliest and leading case is *William Penn v. Lord Baltimore*.² Lord Hardwicke, speaking of the importance of the case, said: "It being for the determination of the right and boundaries of two great provincial governments and three counties; of a nature worthy the judicature of a Roman Senate rather than of a single judge; and my consolation is, that if I should err in my judgment, there is a judicature equal in dignity to a Roman Senate that will correct it." And of the jurisdiction he said: "The conscience of the party was bound by this agreement, and being within the jurisdiction of this court, which acts *in personam*, the court may properly decree it as an agreement."³

133. A second illustration of this principle would occur where one had fraudulently obtained of another a deed of real estate. A court of equity which had jurisdiction over the person of the defendant would compel him to execute a proper reconveyance, although the real estate was situated in another State;⁴ as, for example, where there was a deed of land lying in New York, both grantor and grantee living

¹ [Massie v. Watts, 6 Cranch, 148; Sutphen v. Fowler, 9 Paige, 280; Gardner v. Ogden, 22 N. Y. 327; McGee v. Sweeney, 84 Cal. 100; Montgomery v. United States, 36 Fed. Rep. 4.] ² Hart v. Sanson, 110 U. S. 151, 154; Spurr v. Scoville, 3 Cush. 578, 583.
³ [Monnett v. Turpie, 132 Ind. 482; Baker v. Rockabrand, 118 Ill. 365.]

⁴ 1 Ves. Sen. 444, A. D. 1750.

in Massachusetts. So, also, where one asserts any right or holds any deed which operates unjustly as a cloud upon the title of another, equity will compel the person thus unlawfully asserting title to execute a proper release if he is personally within the jurisdiction of the court, without any reference to the situation of the property itself.

134. So, also, equity will remove a cloud upon a title by setting aside a deed made at sheriff's sale in another State.¹ So, also, in a proper case equity will compel a release by mortgagee to mortgagor of the mortgaged estate, although the estate is in another jurisdiction. In England the doctrine has even been extended to a bill to foreclose a mortgage by the mortgagee against the mortgagor.²

135. (2) The second particular in which a court of equity manifests its peculiar jurisdiction over the person of a defendant is in the authority which it exercises over him to restrain the bringing of inequitable suits or the making of inequitable defences at law.³

Courts of law and of equity are coördinate tribunals, of equal authority within their respective jurisdictions, and neither has any right to assume or to exercise any control over the other, or to prescribe to the other what suits it may or may not entertain. A court of equity has no control over a court of law, and therefore cannot act directly upon the latter. It has no right to issue its mandate to a common-law court ordering it not to entertain a given suit or defence, and, should it undertake to do so, the proceeding would be treated as an unwarranted interference of one court with another, and it would be disregarded.⁴

136. But a court of equity may have jurisdiction over individuals who are litigants in a court of law, and by its

¹ *Remer v. Mackay*, 35 Fed. Rep. 86; [*Briggs v. French*, 1 Sumner, 504.] Mich. 319; *Ferrin v. Errol*, 59 N. H. 234; *Hall v. Piddock*, 21 N. J. Eq. 311; *Atlantic De Laine Co. v. Tredick*, 5 R. I. 171.]

² *Paget v. Ede*, L. R. 18 Eq. Cas. 118; [*Toller v. Carteret*, 2 Vernon, 494.] ⁴ [*McKim v. Voorhies*, 7 Cranch, 279; *Erie R. R. Co. v. Ramsey*, 45

³ [*Becker v. Church*, 115 N. Y. 562; *Thompson's Appeal*, 107 Pa. St. 559; *McKibbin v. Bristol*, 50 N. Y. 637, 649; *Stanton v. Embry*, 46 Conn. 65; *Given's Appeal*, 121 Pa. St. 260.]

power with them it can, indirectly but most effectually, control the proceedings in the latter court. It can enjoin a plaintiff in a suit at law from prosecuting his suit, or it can enjoin a defendant in such suit from setting up a purely legal defence whenever there is a good answer in equity to such suit or defence which cannot be availed of at law. Suppose a suit at law upon a written contract, the defence to it being that there is a material mistake in the contract as written, — what remedy has the defendant? None whatever at law. He is helpless there, because in that court he is not allowed to prove by parol testimony that there is any mistake in the instrument. Equity, however, under these circumstances, will enjoin the plaintiff from prosecuting his suit at law until the defendant has had an opportunity in a court of equity to prove, if he can, the alleged mistake, and to have the instrument corrected. By this power a court of equity can redress wrongs which otherwise would be remediless. Its authority is exercised over the individuals who are litigants in common-law courts, but not over the courts themselves.

137. Not only can a court of equity come to the relief of a party, pending the suit at law, to prevent an unjust judgment against him, but also, when a judgment has been obtained fraudulently, without the fault of the defendant, it can give relief by enjoining the fraudulent party from enforcing his judgment.¹ In such a case, it does not attempt to control the common-law court which rendered the judgment, but it does deal with the fraudulent party, and it prohibits him from availing himself of the judgment which he has wrongfully obtained.

The necessity for this equitable interference arises from the fact (as I have explained already) that at law a domestic judgment is conclusive between the parties, and the de-

¹ [Pearce v. Olney, 20 Conn. 544; guilty of laches or negligence in the Cage v. Cassidy, 23 Howard, 109; original suit, relief will not be given. Johnson v. Christian, 128 U. S. 374; Darling v. Mayor of Baltimore, 51 R. R. Co. v. Titus, 27 N. J. Eq. Md. 1; Pettes v. Whitehall Bank, 102; Wingate v. Haywood, 40 N. 17 Vt. 435; Hendrickson v. Hinckley, 17 How. 443; Albro v. Dayton, 23 Ill. 325. See, also, *infra*, p. App. 548. But if the plaintiff be 472.]

fendant is not permitted to allege that it was obtained by fraud. As to foreign judgments it is otherwise.

138. Under the Constitution of the United States, which provides that full faith and credit shall be given to the judgments of any State in every other State, it is settled that the judgment of one State, when sued upon at law in another State, cannot be impeached for fraud, and hence that to set aside such a judgment recourse must be had to equity. To this extent the judgments of the several States are treated as domestic and not as foreign judgments.¹

139. The right of a court of equity to enjoin a person from enforcing a judgment at law, for the reason that it has been obtained by fraud, was established in a very early case, *Oxford's Case*,² in which Lord Chancellor Ellesmere enjoined the defendant from enforcing a judgment which he had improperly obtained at law in the King's Bench. This led to a bitter controversy between the Lord Chancellor and Lord Coke, who was then Chief Justice of the King's Bench. The Chief Justice declared that the injunction was an interference with the authority and jurisdiction of his court; but the Chancellor maintained his ground, and the doctrine of *Oxford's Case* has been the law ever since. "In the exercise of this power [to enjoin suits or defences] courts of equity proceed, not upon any claim of right to interfere with or control the course of proceedings in other tribunals, or to prevent them from adjudicating on the rights of parties when drawn in controversy and duly presented for their determination. But the jurisdiction is founded on the clear authority vested in courts of equity over persons within the limits of their jurisdiction, and amenable to process, to restrain them from doing acts which will work wrong and injury to others, and are therefore contrary to equity and good conscience. . . . The decree of the court in such cases is pointed solely at the party, and does not extend to the tribunal where the suit or proceeding is pending."³

¹ *Christinas v. Russell*, 5 Wall. 290; *Hanley v. Donoghue*, 116 U. S. 1. [See, also, *supra*, p. 45.]

² 1 Ch. Rep. 1.

³ Chief Justice Bigelow in *Dehon v. Foster*, 4 Allen, at p. 550. See, also, *Lord Portarlington v. Soulby*, 3 M. & K. 104.

140. In England this jurisdiction has been abolished by the Judicature Act of 1873 (36 & 37 Vic. ch. 66, § 24) and it is enacted that no cause or proceeding pending in the High Court of Justice, or in the Court of Appeal, shall be restrained by injunction, but that the equitable matter may be set up as a defence in the suit at law.¹

141. To the general principle just stated there is one important exception in this country, created by a statute of the United States passed in 1793.² By this statute the courts of the United States are prohibited from enjoining suits or proceedings pending in any state court. "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."³

This prohibition was probably introduced in deference to the jealousy which was then felt in some quarters at any encroachment by the Federal government or by its courts upon the rights of the individual States; and to prevent the assertion, even indirectly, by the Federal courts, of any control over the state courts.

As, by the Constitution of the United States, Congress alone can pass a bankruptcy law, and as the courts of the United States only are authorized to administer such a law, it was necessary to its proper and uniform administration that those courts should have power to enjoin any suits or proceedings in the state courts which interfered with bankruptcy proceedings.

142. The prohibition in the statute, it will be observed, is confined to injunctions by the courts of the United States over suits in any state court. It is not probable, however, that any state court would undertake to enjoin any proceedings in a United States court, for two reasons: first, out of

¹ Kerr's Injunctions, 512; Garbutt v. Fawcus, L. R. 1 Ch. D. 155.

² U. S. Rev. Stats. § 720, p. 136.

³ [Diggs v. Wolcott, 4 Cranch, 179; Whitney v. Wilder, 54 Fed. Rep. 554. The statute applies only

to "pending" suits. It does not apply to a threatened suit. The bringing of a suit in a state court may be enjoined by a Federal court. Texas & Pacific Ry. Co. v. Kuteman, 54 Fed. Rep. 547.]

respect and comity, and, secondly, because the Federal courts are courts of equity as well as of law, so that a party to a suit at law in a Federal court can have full relief in equity in the same court.¹

But the right of a state court "to restrain persons within its jurisdiction from prosecuting suits either in the courts of this State, or of other States or foreign countries, is clear and indisputable."²

¹ [Schuyler v. Pellisier, 3 Edw. Ch. 191; Chapin v. James, 11 R. I. 86; Logan v. Lucas, 59 Ill. 237.]

² [Dehon v. Foster, 4 Allen, 545, 550; Cole v. Cunningham, 133 U. S. 107; Bank, &c. v. Rutland R. R. 28 Vt. 470; Willson v. Joseph, 107 Ind. 490; Snook v. Snetzer, 25 Ohio St. 516; Keyser v. Rice, 47 Md. 203. *Contra*, Mead v. Merritt, 2 Paige, 402; Bicknell v. Field, 8 Paige, 440. But these cases are overruled by Vail v. Knapp, 49 Barb. 299.]

[NOTE.—A few other maxims, the principles of which are treated by the author in their appropriate places, are stated here for convenience :—

"Equity imputes an intention to fulfil an obligation." Wilcocks v. Wilcocks, 2 Vernon, 558; Pomeroy's Eq. § 420 *et seq.*

"*Vigilantibus non dormientibus æquitas subvenit.*" (Equity aids the vigilant only, not those who slumber on their rights.) Smith v. Clay, 3 Brown's Ch. 639, note; McNeil v. Magee, 5 Mason, 244; Tash v. Adams, 10 Cush. 252. In Bassett v. Company (47 N. H. 426, 439) the plaintiff was refused an injunction against the defendant, who had wrongfully built a dam and overflowed the plaintiff's land, because the plaintiff had allowed six years to go by, during which the defend-

ant was making improvements, before he asserted his rights. See, also, Bell v. Hudson, 73 Cal. 285; Evans's Appeal, 81 Pa. St. 278; Barnes v. Taylor, 27 N. J. Eq. 259; King v. Wilder, 75 Ill. 275; Tuttle v. Wilson, 10 Ohio, 24. Cases of laches come under this head. See *infra*, p. 512.

"Between equal equities time shall prevail." A, having the legal title, subject to B's lien as vendor, conveyed to D for a valuable consideration. The deed was defective; and the equities being equal, it was held that the lien of B should have the preference. Hume v. Dixon, 37 Ohio St. 66.

"He who commits inequity shall not have equity," or "He who comes into equity must do so with clean hands." For example, the court refused to decree foreclosure of a mortgage because the mortgagee had required usurious interest. Union Bank v. Bell, 14 Ohio St. 200. In another case, subrogation was denied to one guilty of fraud. Bleakley's Appeal, 66 Pa. St. 187. So, also, the court will not decree specific performance of an unconscionable agreement. Eastman v. Plummer, 46 N. H. 464. See *infra*, Specific Performance, p. 407. Where plaintiff and defendant have been engaged in an illegal transaction, equity, as a general rule, will

not interfere to aid either. *Creath v. Sims*, 5 Howard, 192; *Rock v. Matthews*, 35 W. Va. 531; *Harrington v. Bigelow*, 11 Paige, 349. But where the parties are not strictly *in pari delictu*, and public policy seems to require that equity should relieve the one less in fault, such relief will be given. *Jones v. Building Society* [1892], 1 Ch. 173. For example, a judgment obtained upon a note given to pay a gambling debt was enjoined. *Rucker v. Wynne*, 2 Head (Tenn.) 617; *Johnson v. Cooper*, 2 Yerger (Tenn.), 524. The subject is discussed in *Tracy v. Talmage*, 14 N. Y. 162. See, also, 1 Pomeroy's Eq. § 402. One of two partners engaged in an illegal business cannot maintain a bill in equity against the other for his share of the profits. *Wheeler v. Sage*, 1 Wallace, 518. Where the plaintiff has conveyed property to the defendant in fraud of creditors, with a secret agreement for reconveyance to the plaintiff or to his wife, the court will not entertain a bill by the plaintiff for specific performance. *Freeman v. Sedwick*, 6 Gill, 28; *Doughty v. Mil-*

ler, 50 N. J. Eq. 529. So, also, the court refused to enjoin a defendant from copying the plaintiff's deceptive trade-mark for cigars. The trade-mark was a Spanish word, and it appeared that the plaintiff had adopted it in order to mislead purchasers of his Connecticut tobacco. *Palmer v. Harris*, 60 Pa. St. 156. An Iowa court refused to enjoin the use of the defendant's pigsty, it being proved that the plaintiff's pigsty was equally offensive. *Casady v. Cavenor*, 37 Iowa, 300. See, also, *Dunning v. Bathrick*, 41 Ill. 425; *De Grauw v. Mechan*, 48 N. J. Eq. 219; *Richardson v. Walton*, 49 Fed. Rep. 888.

"Equity will not suffer a wrong to be without a remedy." *Rees v. City of Watertown*, 19 Wall. 107, 121; 1 Pomeroy's Eq. § 420.

"Equity looks to the substance rather than to the form." Upon the principle stated in this maxim depend the recognition of equitable estates, the doctrine of the redemption of mortgages, the doctrine of penalties and forfeitures, and that disregard of a seal which is peculiar to equity. 1 Pomeroy's Eq. § 378.]

CHAPTER VII.

TRUSTS.

143. A TRUST is the duty or obligation which arises where one holds the legal title of property for the benefit of another.

A conveyance of an estate is made to A for the purpose of managing it, collecting the rents and profits, and paying them over to B. If A accepts the conveyance, the duty which he thus assumes to hold the legal title for the benefit of B, to collect the rents and pay them over to B, is the trust upon which he holds the property. A is the trustee, B is the *cestui que trust* or beneficiary, and the estate conveyed by the deed is the trust estate. That interest or estate (as we shall see later) may be for years, or for life, or in fee. It may be more or less; but whatever be the interest which is conveyed to the trustee, to be held by him for the benefit of the *cestui que trust*, that interest, properly speaking, is the trust estate.

Very often this term "trust estate" is used inaccurately to denote the interest of the *cestui que trust* himself in the trust estate. But the trust estate and the interest of a particular beneficiary therein are two very different things. The trust estate may amount, very often it does amount, to a fee simple; but very often, also, the interest of the first beneficiary in order of time is only for his own life, — an equitable life estate.

144. The interest of the *cestui que trust* in the trust estate, whatever may be its extent or limit, is properly described as an equitable estate or interest. His title is strictly an equitable title as distinguished from the legal title held by the trustee. The common law does not recognize his title or interest.

The equitable title of the *cestui que trust*, and the duty or

trust devolving upon the trustee, are matters within the exclusive jurisdiction of equity, and they constitute one of the most important branches of its jurisprudence. To prescribe and enforce the duties of the trustee, to define, protect, and secure the equitable interest of the *cestui que trust* in the trust estate, are within the exclusive prerogative of a court of equity.¹

145. ORIGIN OF TRUSTS. — “Uses,” as trusts were originally called, are said to have been devised by the Ecclesiastics to evade the statute of mortmain. This statute prohibited the giving of lands for religious purposes. The device to which they resorted was, that, while the feoffor, *i. e.* the grantor, conveyed the estate to any person legally capable of taking it, he declared in the same instrument that the use of the estate was to be in some third person, for instance in some religious body. By this means it was managed to transfer the beneficial interest in an estate to corporations or persons whom the law forbade to receive the legal title. And the Court of Chancery, by means of the writ of subpœna, which was invented in the time of Richard II. by John Waltham, Bishop of Salisbury, summoned before it a refractory trustee and compelled him to execute the use or trust for the benefit of the beneficiary. This device was resorted to, in the course of time, not only in feoffments, but also in the case of wills.

146. At length it was determined to abolish the application of uses to freehold land, and the statute of 27 Henry VIII.² was passed, by which it was provided “that, where any person stands seised of lands or hereditaments to the use of any other person or body politic, such person or body politic shall henceforth stand and be seised of, and be deemed in lawful seisin, estate, and possession, of such lands or hereditaments.”³

The effect of this statute was to convert at once all “uses” into legal estates, and thus to bring them within the rules

¹ [Dorsey’s Lessee *v.* Garey, 30 Md. 489; McCartney *v.* Bostwick, 32 N. Y. 53; First Baptist Society *v.* Hazen, 100 Mass. 322; Beach *v.* Beach, 14 Vt. 28.]

² Ch. 10, § 1.

³ 1 Perry on Trusts, § 298.

of law and within all statutes affecting legal estates, and, among others, the statute of mortmain. By this statute, if A held the legal estate for the use of B, B at once became the holder of the legal estate, just as if the deed of feoffment had been made directly to him in the first place. And therefore, if B was the head of a religious house, or was any other person or body within the statute of mortmain, the legal estate, as soon as it vested in B, became void, and reverted to the crown under the statute of mortmain.

147. But this statute of Henry VIII. very soon failed to accomplish its object so far as future conveyances were concerned. First, the statute, by its express terms being applicable only to freehold estates, of which seisin, technically, could be had or given, was soon decided not to apply to trusts of personal property, nor to leasehold or copyhold estates. Secondly, inasmuch as the statute applied only to the simple case where A was merely a passive trustee, having nothing to do in the performance of the trust, it did not affect those trusts where the trustee had some active duties to perform; as, if A, the trustee, were directed to collect the rents and profits and turn them over to B.

Finally, the effect of the statute was entirely obviated by engrafting a use upon a use, which was done by adding to the old form the additional words, "to the use of," or "in trust for." As we have seen already, before the statute, if there was a feoffment to A and his heirs for the use of B and his heirs, A took a legal fee simple, and B was a *cestui que trust* whose interest the Court of Chancery would protect by its writ of subpoena in case A attempted to repudiate the trust. The effect of the statute of Henry VIII. was to transfer the legal title out of A into B and his heirs. This was the first change.

148. Then was devised this conveyance: "To A and his heirs, to the use of B and his heirs, to the use of (or in trust for) C and his heirs." The courts thereupon held that the statute had no effect beyond the use limited to B. It converted that use into a legal estate, but then its power was exhausted. It did not apply to or operate upon the second use in any degree. Therefore, upon this construction, under

such a form of feoffment, although B's use was converted into a legal estate, he held that estate in trust for the use and benefit of C. And this trust was as clearly within the control of a court of chancery as the original use had been before the statute of Henry VIII. Thus, as has been said, the whole (ultimate) effect of the statute of uses was to add four words to every conveyance, namely, "to the use of."

Different Classes of Trusts.

149. Trusts are either express or implied.

Express trusts are those which are voluntarily created by the person having dominion over the property at the time.

Implied trusts are trusts created and imposed by law.

Implied trusts are again subdivided into resulting and constructive trusts.

150. A different division has been made by some writers, but I think the above has the merits of simplicity and accuracy. Mr. Perry, in his excellent work, following Snell, makes a distinction between implied trusts on the one hand and resulting and constructive trusts on the other, treating the former, implied trusts, as a class by themselves, and giving that name to trusts which are created by "precatory words," so called, in wills or other instruments, — most frequently in wills. But this distinction is utterly unsound and misleading.

An express trust is in no sense an implied trust. No trust can be created by a testator, for instance, unless he uses words which by fair construction amount to a trust. The courts have construed certain language used by testators from time to time as intending to create and therefore as creating a trust; and from the fact that these expressions have been more or less in the form of request rather than positive direction, they have come to be called "precatory words." But whenever these words are held to create a trust, it is not because the law has undertaken to add anything to the language of the testator, but because the words themselves, properly construed, amount to the declaration of a trust just as much as if they had been of the most positive and explicit character. Nothing is better settled than

that the court can add nothing to the language of a will. If, by applying the proper rules of construction, the words remain uncertain or unintelligible, then the will in that particular is void for uncertainty.

I therefore repeat that to classify any trusts which are created by a testator with implied trusts is inaccurate and unsound, and tends to confuse the student.

Trusts, then, are either express, *i. e.* created by the use of language; or they are implied by law, *i. e.* they are trusts which the law itself creates out of the acts and relations of the parties.

151. Before considering trusts in detail, I shall briefly consider: 1st, Who may be a trustee; 2d, Who may be a *cestui que trust*; 3d, What property may be the subject of a trust.

(1) WHO MAY BE TRUSTEES? All persons *sui juris* may be trustees.¹ Married women, if of age, may be trustees.² And they may be such independently of any statute.³ Infants, to a certain extent, may be trustees.

152. Infants may be trustees by devolution or necessity. For example, a trustee holding the legal title in fee simple dies. That legal title descends to his heirs at law; and the heir at law may be an infant, but nevertheless he would hold the legal title as trustee for the benefit of the *cestui que trust*. Under such circumstances, however, equity will at once appoint a suitable trustee, to whom the infant trustee will be required to convey the legal title. And the court will direct this to be done, usually by a guardian *ad litem*, the infant joining in the deed.⁴

¹ [An alien may be a trustee: *Cammeyer v. United Churches*, 2 Sandf. Ch. 186, 249. A near relative may be appointed, but such appointments are in general objectionable: *Wilding v. Bolder*, 21 Beav. 222. The county board may be a trustee: *Prickett v. The People*, 88 Ill. 115. A nun may be a trustee: *Smith v. Young*, 5 Gill, 197. A person who is insolvent may be a trustee: *Shyrock v. Wag-*

goner, 28 Pa. St. 430. The fact that the proposed trustee resides abroad is of course objectionable: *Meinertzhagen v. Davis*, 1 Coll. 335. A witness to a will may be a trustee under it: *Hogan v. Wyman*, 2 Oregon, 302.]

² Mass. Pub. Stats. ch. 147, § 5.

³ 1 Perry on Trusts, §§ 48-51. [*People v. Webster*, 10 Wend. 554.]

⁴ [*Binion v. Stone*, Free. Chy. 169.]

153. Corporations may be trustees. The suggestion that a corporation should ever become a trustee is very foreign to the original conception both of a trustee and of a corporation. But in modern times corporations are often authorized by their charters to act in this capacity, and they often do so act.¹ Trust companies frequently are trustees, especially under railroad mortgages. Some companies are formed for the special purpose of administering trusts, *i. e.* holding and managing property for the use and benefit of *cestuis que trustent*. In several States, as for example in Connecticut, corporations are chartered to act as executors and administrators of estates.

154. Whenever a vacancy occurs and a new trustee is appointed, the court will require the former trustee, if living, or his heirs or representatives if he be dead, to make a proper conveyance of the trust estate to the new trustee. In Massachusetts the statute² provides that upon the appointment of a new trustee the estate shall thereupon vest in him, and that the court may order the former trustee or his representative to make a proper conveyance of the estate to the new trustee.

155. (2) WHO MAY BE CESTUIS QUE TRUSTENT?—The answer is, any one,³ unless an alien enemy.⁴

156. (3) WHAT PROPERTY MAY BE TRUST PROPERTY.—

¹ [In *Vidal v. Girard's Executors*, 2 How. 127, it was held that a city could be a trustee for a charitable institution. But a corporation cannot be a trustee for any object foreign to the purposes for which it was created: *Jackson v. Hartwell*, 8 Johns. 422. See, generally, *Green v. Rutherford*, 1 Ves. Sen. 462; *Trustees of Phillips Academy v. King*, 12 Mass. 546; *The Dublin Case*, 38 N. H. 459, 577; *First Congregational Society v. Atwater*, 23 Conn. 34; *Morris v. Way*, 16 Ohio, 469.]

² Pub. Stats. ch. 141, § 6.

³ [*Barrow v. Wadkin*, 24 Beav.

1; *Nightingale v. Goulburn*, 5 Hare, 484. A State may be a *cestui que trust*. *Neilson v. Lagow*, 12 How. 107. There is a general rule that one incompetent to take the title to property cannot be a *cestui que trust* as to such property. Thus it was held that a free negro prohibited by law from owning slaves could not be the *cestui* of slaves. *Dunlop v. Harrison*, 14 Grat. 251. See *Perry on Trusts*, §§ 60–65.]

⁴ [That an alien enemy cannot be a *cestui que trust* was decided in *Bradwell v. Weeks*, 13 Johns. 1, overruling Chancellor Kent's decision reported in 1 Johns. Ch. 206.]

All property, real or personal, which can be sold or assigned at law, may be the subject of a trust.¹ The only things which cannot be are those rights or interests which by the policy of the law are not assignable. These exceptions are, an officer's commission in the army or navy, a judge's salary, and any pension or annuity granted by the government.²

Express Trusts.

157. Sir William Grant, speaking of express trusts in *Cruwys v. Coleman*,³ said: "To constitute a valid [express] trust, undoubtedly three circumstances must concur: sufficient words to raise it; a definite subject; and a certain or ascertained object." That is to say (1) the trust itself must clearly be created, (2) the property which is to be the subject of the trust must definitely be described, and (3) the beneficiary or *cestui que trust* must plainly be pointed out. If either of these particulars is left in such obscurity that the court cannot gather from the instrument itself either what the trusts intended to be created are, or what is the property, or who are the beneficiaries indicated, the trust must fail entirely for uncertainty.

158. In case of such failure, if the trust is attempted to be created by deed, the trust estate reverts to the grantor. If it be created by last will, it reverts to the testator's estate, and goes either to the heir at law, or to the devisee of the residue of his estate, if there be such devisee.⁴

It may happen that a testator has made a devise to a trustee named, but has omitted to specify the trust. In such a case the trustee does not take, because it is clearly not the intention of the testator that he should, but the estate reverts.

159. A TRUST DOES NOT FAIL FOR WANT OF A TRUSTEE. — To guard against misapprehension, I might state here that the

¹ [Morison v Moat, 9 Hare, 241; Robinson v. Mauldin, 11 Ala. 977. In Green v. Folgham, 1 Sim. & St. 398, the trust property was a receipt for making medicine. See, also, Lewin on Trusts, p. 47. This rule extends even to a mere possibility or chose in action which could not be assigned at common law. 1 Perry on Trusts, § 68.]

² 1 Perry on Trusts, § 69.

³ 9 Ves. 319, 323.

⁴ [See *infra*, pp. 138, 155.]

certainty required in reference to the purposes, the property, and the beneficiaries of a trust does not extend to the person who is to exercise the trust, that is, to the trustee himself. It may happen, it often has happened, that the testator has omitted to name the trustee. Equity will supply the omission where it is clearly the testator's intention to create a trust. It is a favorite maxim, often quoted and commented upon, that equity will never allow a trust to fail for want of a trustee. So, in case of the death of a trustee, or of his refusal or incapacity to act, a court of equity will always appoint a new trustee, if the instrument creating the trust does not otherwise provide for his appointment.¹

160. THE STATUTE OF FRAUDS.—According to the early common law, trusts in all cases could be created by parol, by spoken words, without writing.² But the statute of frauds (29 Charles II. ch. 3, § 7) made a great change in the law in this respect as well as in other particulars. Section 7 enacted that “all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect.”

This statute has been reënacted substantially in most if not in all of the United States, and, wherever it is in force, express trusts relating to land cannot be proved by parol. They must be “manifested or proved by some writing to that effect signed by the party creating or declaring the trust.”

161. The phraseology in many of the state statutes has de-

¹ [Dodkin v. Brunt, L. R. 6 Eq. 580; McCartee v. Orphan Asylum, &c. 9 Cowen, 437; De Peyster v. Clendenning, 8 Paige, 295; Inhabitants of Anson, Petitioners, 85 Me. 79. See *infra*, p. 167. In Sonley v. Clockmakers' Co. 1 Bro. Chan. 81, the corporation being prohibited by the statute of mortmain from holding

property, the court appointed a trustee to act in its place. In Jones v. Clifton, 101 U. S. 225, a deed given by a husband to his wife being involved, the court appointed the husband a trustee for his wife of the property covered by the deed.]

² [Perry on Trusts, § 75; Harvey v. Gardner, 41 Ohio St. 646.]

parted more or less from that of the original statute, but the uniform construction has been that they do not vary in meaning from the original statute.

Thus, the Public Statutes of Massachusetts, ch. 141, § 1, provide that "no trust concerning lands . . . shall be created or declared unless by an instrument in writing signed by the party, or by the attorney of the party, creating or declaring the trust."

In *Urann v. Coates*¹ it was decided that "no change in the meaning or effect of it [the English statute of frauds] was intended or made."

162. The first point to be noticed under this statute is, that it is not necessary that a trust should originally be "created by an instrument in writing." It is sufficient if it is "manifested," that is, acknowledged or declared by any instrument in writing, whenever made, and signed by the proper party.²

A written admission that the property is held in trust, if sufficiently explicit in other respects as to the terms of the trust, satisfies the statute.

163. There are two methods, exclusive of wills, by which trusts are commonly created or declared. (In the case of wills, of course, the only evidence of a trust is in the will itself.) First, the owner of the estate proposing to create the trust conveys it by proper deed to the trustee, and in the deed itself sets forth that the conveyance is made upon trust, and what the trust is. Here the deed tells the whole story, and the grantee named, by accepting the conveyance, accepts it *cum onere*, that is, with the duties and obligations imposed upon him by the deed. In this case, the owner of the estate is the proper person to create and declare the trusts to be imposed upon it, and his deed to that effect, signed by himself, complies with the statute.

164. The second mode is where the owner makes a simple, absolute conveyance to the proposed trustee, and the grantee in return gives a statement in writing of the purposes or

¹ 109 Mass. 581, 585.

² [*Forster v. Hale*, 3 Ves. 696, 707; *Second Unitarian Society v. Woodbury*, 14 Me. 281; *Steere v. Steere*, 5 Johns. Ch. 1; *Safford v. Rantoul*, 12 Pick. 233; *Maccubbin v. Cromwell*, 7 Gill & J. 157; *Piney v. Fellows*, 15 Vt. 525.]

trusts upon which he holds the property. In this case there is an absolute conveyance, on the one hand, and in return a written declaration of the trusts upon which the property is held.¹

A simple deed with a declaration in return, signed by the trustee, of the trusts upon which he holds the estate, is not an unusual and may often be the most convenient method of creating the trust.

165. It is chiefly in reference to this second class of cases — where the legal title simply is conveyed to the trustee by the deed of conveyance — that questions have arisen as to what is a sufficient “manifestation” within the statute of the trust. The form in which this acknowledgment or declaration of trust is made is unimportant. It may be made in the recital of a bond, in an affidavit, in a letter, in a printed pamphlet.² Any writing, signed by the alleged trustee, which admits the beneficial character in which he holds the property and the purposes for which he holds it, is sufficient.³

It is now well settled that if a defendant in his answer to a bill in equity admits the trust, without setting up the statute of frauds, he will be held to have waived the benefit of the statute, and his answer may be used as a written declaration and proof of the trust.⁴

166. THE STATUTE OF FRAUDS AND PERSONAL PROPERTY. The second point especially to be noticed under the statute of frauds is that the statute does not apply to personal estate, but only to real estate. Trusts, therefore, relating to personal estate may be created and proved by parol. This is clear from the language of the statute itself, which

¹ [Kintner v. Jones, 122 Ind. 148; the cases are cited. [Hampton v. Hoffman v. Gosnell, 75 Md. 577.] Spencer, 2 Vernon, 288; McLaurie

² Barrell v. Joy, 16 Mass. 221.

³ The cases are collected in a note to 1 Perry on Trusts, § 82. [Blodgett v. Hildreth, 103 Mass. 484; Taft v. Dimond, 16 R. I. 584; Packard v. Putnam, 57 N. H. 43; Cook v. Barr, 44 N. Y. 156.]

⁴ 1 Perry on Trusts, § 84, where

v. Partlow, 53 Ill. 340; Woods v. Dille, 11 Ohio, 455; Whiting v. Gould, 2 Wis. 552; McVay v. McVay, 43 N. J. Eq. 47. As to whether the defendant may admit the trust in his answer, and still insist upon the statute, see Story's Eq. Plead. § 766.]

is confined to "lands, tenements, and hereditaments," or, as in the Massachusetts statute, "no trust concerning lands," etc. And this has been the uniform doctrine since the statute of frauds was enacted.¹

167. We have seen that every interest in personal estate which is legally assignable may be the subject of a trust. The interest of a mortgagee in a mortgage of real estate given as security for a debt is but a chattel interest, and therefore a trust therein may be created or proved by parol.² The Massachusetts cases just cited are sufficient authority to this effect.

Two observations remain to be made in regard to trusts of personal property: First, that, to establish a trust by parol, the terms of the trust must be shown as definitely as in the case of written trusts.³ They need not be shown as satisfactorily, because oral proofs seldom if ever can be so convincing as a writing, inasmuch as they depend on the memory and veracity of a witness.

168. Secondly, if a trust in relation to personal estate has been created in writing, no parol evidence is admissible to control or vary it, any more than it would be admissible in reference to a written declaration of trusts relating to lands. The same rule of evidence is applicable to both cases, namely, that parol evidence is not admissible to contradict or vary a written instrument.⁴

The Statute of Frauds and Implied Trusts.

169. The statute of frauds applies exclusively to trusts created by the party; that is, to express trusts. It does not apply to trusts created by law; that is, to implied trusts.

¹ *Sturtevant v. Jaques*, 14 Allen, 523; *Thacher v. Churchill*, 118 Mass. 108, 110; 1 *Perry on Trusts*, § 86; [*M'Fadden v. Jenkyns*, 1 Hare, 458; *Chace v. Chapin*, 130 Mass. 128; *Maffit v. Rynd*, 69 Pa. St. 380; *Porter v. Rutland Bank*, 19 Vt. 410; *Kimball v. Morton*, 5 N. J. Eq. 26; *Gilman v. McArdle*, 99 N. Y. 451.]

² [*Bellasis v. Compton*, 2 Vernon, 294; *Tapia v. Demartini*, 77 Cal. 383.]

³ [*Brickell v. Earley*, 115 Pa. St. 473; *In re Stanger*, 35 Fed. Rep. 238; *Woodward v. Sibert*, 82 Va. 441.]

⁴ [*Langham v. Sandford*, 19 Vesey, 641; *Steere v. Steere*, 5 Johns Ch. 1.]

All implied trusts are necessarily exempted from the operation of the statute.¹ If we bear this clearly in mind, it will help us to solve many questions, and it will explain many seeming contradictions between the statute and decided cases.

There is a vast field of trusts upon which the statute of frauds was never intended to trench. It is that class of trusts which the law itself creates and imposes upon parties on account of their relation to the property in question, or on account of the manner in which they may have dealt with it. And this it often does in opposition to the express wish and intent of the party.

Such manner of dealing or such relations give rise to a duty, and that duty or trust the law takes cognizance of and compels the party to perform. In any case of this description no trouble need be borrowed from the statute of frauds. The only thing necessary is to establish the legal duty or trust.

170. But whenever an attempt is made to set up a trust, because, as it is alleged, A has created or declared such a trust in favor of B, when the only foundation for the alleged trust is the voluntary act of the party, then the first inquiry must be, are the requirements of the statute fulfilled by a sufficient declaration in writing?²

The eighth section of the original statute of frauds expressly excluded implied trusts, as follows: "Provided always that where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of

¹ [*Botsford v. Burr*, 2 Johns. Ch. 405; *Reynolds v. Sumner*, 126 Ill. 58; *Beck v. Beck*, 43 N. J. Eq. 39; *Sullivan v. Sullivan*, 86 Tenn. 376; *Brison v. Brison*, 75 Cal. 525. And the nature of the trust which the law implies from the circumstances is not changed because the parties have actually made an agreement between themselves respecting the real estate identical with the one

which the law imputes to them; that is, the trust is still an implied trust. *Corr's Appeal*, 62 Conn. 403. Although implied trusts are specially exempted by the statute of frauds itself, they are exempt in the very nature of things, without this provision. See Judge Story's opinion in *Hoxie v. Carr*, 1 Sumner, 187.]

² [*Taylor v. Sayles*, 57 N. H. 465; *Columbus, &c. R. R. Co. v.*

law, or be transferred or extinguished by an act or operation of law, then and in every such case such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made, anything hereinbefore contained to the contrary notwithstanding."

The Massachusetts statute bringing both sections into one reads: ¹ "No trust concerning lands, except such as may arise or result by implication of law, shall be created or declared unless by an instrument in writing," etc.

171. Implied trusts, as I have already defined them, are trusts created by law (being either resulting or constructive trusts), and therefore they are exempted from the statute.

It was so held by Lord Hardwicke in *Ryall v. Ryall*² and in *Lloyd v. Spillet*,³ by Chancellor Kent in *Boyd v. McLean*,⁴ and it is well settled by a long course of decisions.⁵

We have thus far ascertained, 1st, That an express trust relating to land must be created or manifested by a writing signed by a party competent to declare the trust; 2d, That the statute of frauds does not apply to trusts relating to personal property; 3d, That it does not apply to implied trusts, that is, to trusts created by law.

172. EXPRESS TRUSTS, HOW MANIFESTED. — The next step is to ascertain what language is necessary to create or manifest an express trust.⁶ The requirements in this respect are very simple. Any language which indicates that the conveyance is made to the grantee in order that he may hold the property, not for his own benefit, but for the benefit of another, creates a trust. The simplest and best form is: "To A, his heirs and assigns forever, but strictly in trust for the purposes and upon the trusts following, namely."

From this language no doubt can arise that a trust is created and that the grantee takes no title other than that of

Braden, 110 Ind. 558; Preston v. ⁵ Livermore v. Aldrich, 5 Cush. Casner, 104 Ill. 262; Green v. 431, 435, and cases cited; Childs v. Jordan, 106 Mass. 321. Cates, 73 Mo. 115.]

¹ Public Statutes, ch. 141, § 1.

² 1 Atk. 59.

³ 2 Atk. 148.

⁴ 1 Johns. Ch. 582.

⁶ [Urann v. Coates, 109 Mass. 581; Fisher v. Fields, 10 Johns. 495.]

trustee. Then should follow a plain statement of the trusts which the grantor or testator wishes to create; for example, "to hold and manage the estate, with power to sell and reinvest the same according to his judgment and discretion, to collect all rents and income, and to pay over the net income to my son B during his life, at least semi-annually, and upon his death to convey all said estate in equal proportions to the children of said B."

173. A declaration of trust may be equally simple, namely: "Whereas A has conveyed to me by his deed of this date" (a certain estate, or certain property, describing it), "I hereby acknowledge and declare that said property was conveyed to me, and that I hold the same strictly in trust for the following uses and purposes, and not otherwise, which I hereby covenant and agree to observe and perform, namely."

No difficulty and no ambiguity need arise if the conveyancer will only confine himself to the simplest and most direct language. But the ingenuity of man has exercised itself in the use of ambiguous language, and a vast variety of cases has arisen, under wills particularly, where the question was whether the testator did or did not intend to create a trust.

CHAPTER VIII.

PRECATORY WORDS.

174. THE phrase "precatory words" is technically applied to certain forms of expression used in wills, where a testator, after giving property to a devisee, goes on to state what his wishes or hopes or recommendations are as to the manner in which the devisee shall dispose of the property. The question in all these cases is, whether the property was given to A in trust for the purposes or for the persons subsequently named in the will, or whether A took the property absolutely, the words that followed being intended, not as a restriction of A's absolute right over the property, but merely as a suggestion of what would be in accordance with the testator's desire. As I have said, a great many cases have arisen on this point, and it would be useless to refer to them in detail, and utterly impossible to reconcile the various decisions; but an examination of a few of the leading cases will be necessary to a full understanding of the subject.

175. The disposition of the courts in the outset was to construe almost any form of recommendatory words as a positive direction and trust. In one of the earliest cases, *Massey v. Sherman*,¹ the testator devised property to his wife, "not doubting but that my wife will dispose of the same to and amongst my children as she shall please." This was held to create a trust for the children. Again, in *Malim v. Keighley*,² a testator made a bequest to his daughter, and recommended her to dispose of the property at her death in a certain manner; and the recommendation was held to create a trust. A devise to A, "in the fullest confidence" that upon her death she would dispose of the property in a manner named, was held to create a trust.³ This language was held to be imperative.

¹ Ambler, 520.

² 2 Ves. Jr. 333.

³ *Wright v. Atkyns*, Turn. & R. 143.

So, after a devise to A, the phrases, "it is my will and desire," "my wish and desire," "my hope," "entreat," "recommend," "well assured," "have the fullest confidence," that A, upon his death, would make a certain disposition of the property, have each in turn been held to create a trust in A, the first taker, in behalf of the other persons named, which trust A was bound to carry out; and it was held that A did not take the property absolutely.¹

176. Lord Eldon said in *Wright v. Atkyns*² that, to create a trust which the court can enforce, three things are necessary, namely: "First, the words must be imperative; secondly, the subject must be certain; thirdly, the object must be as certain as the subject."

That is to say, first, the words must amount to a positive direction by the testator to the devisee to dispose of the property in the manner stated; secondly, there must be no uncertainty as to the property which the first devisee is bound to hand over to his successors; and, thirdly, there must be no uncertainty as to the persons whom the testator intended should ultimately take.

Any uncertainty in either of these respects will defeat the trust.³

177. The rule as to precatory words was thus stated in *Warner v. Bates*:⁴—

"If the objects of the supposed trust are certain and definite [that is, if the persons whom the testator intends to take are plainly indicated by him]; if the property to which it is to attach is clearly pointed out; if the relations

¹ See the cases cited in 1 Perry on Trusts, § 112. [In the following cases a trust was held to be established by the words quoted in parentheses: *Coburn v. Anderson*, 131 Mass. 513 (I desire); *Eddy v. Harts-horne*, 34 N. J. Eq. 419 (I request); *Cook v. Ellington*, 6 Jones' Eq. (N. C.) 371 (I wish and request); *Dresser v. Dresser*, 46 Me. 48 (having confidence); *Erickson v. Willard*, 1 N. H. 217 (I desire he should appropriate not exceeding \$50 per year).

See, also, for a full consideration of the subject, Bispham's Eq. § 71 *et seq.*

² Turn. & R. 143.

³ [*Morice v. Bishop of Durham*, 10 Ves. 521, 536; *Knox v. Knox*, 59 Wis. 172; *Graves v. Graves*, 13 Irish Ch. Rep. 182; *Harland v. Trigg*, 1 Brown's Ch. 142; *Harper v. Phelps*, 21 Conn. 257; *Whipple v. Adams*, 1 Met. 444.]

⁴ 98 Mass. 274.

and situation of the testator and the supposed *cestuis que trustent* are such as to indicate a strong interest and motive on the part of the testator in making them partakers of his bounty; and above all, if the recommendatory or precatory clause is so expressed as to warrant the inference that it was designed to be peremptory on the donee, — the just and reasonable interpretation is that a trust is created which is obligatory, and can be enforced in equity as against the trustee by those in whose behalf the beneficial use of the gift was intended.”

178. This is a clearly expressed rule; but the difficulty always is, to determine whether “the precatory clause” is meant to be peremptory or discretionary. There are two suggestions which may possibly throw some light on this difficulty. First, the intent of a testator in any particular clause of a will may be arrived at more safely by a consideration of his general intent concerning his property as derived from a survey of the whole will.¹ And, secondly, the tendency of modern decisions is not to attach to recommendatory or precatory words in a will the character of a trust unless it was clearly the intention of the testator to create one. In *Hess v. Singler*² Chief Justice Gray said: “By the later cases, in this as in all other questions of the interpretation of wills, the intention of the testator as gathered from the whole will controls the court. In order to create a trust, it must appear that the words were intended by the testator to be imperative; and when property is given absolutely and without restriction, a trust is not to be lightly imposed, upon mere words of recommendation or confidence.”

Lord Redesdale long since said that the judge who first construed precatory words as creating a trust made a will for the testator instead of interpreting it. And Lord Justice James in a recent case has said:³ “I cannot help feeling that the officious kindness of the Court of Chancery in interposing trusts where in many cases the father of the family never meant to create trusts, must have been a very cruel kindness indeed.”

¹ *Colton v. Colton*, 127 U. S. 300.

² 114 Mass. 56.

³ *Lambe v. Eames*, L. R. 6 Ch. App. 597.

179. By referring to a few of the more recent cases, we may perceive the present drift of courts upon this subject.

In *Lechmere v. Lavie*¹ there was a devise to daughters of the testator, accompanied by the following clause: "If they die single, of course they will leave what they have amongst their brothers and sisters, or their children." It was held that these words indicated the expectation of the testator, but were not intended to create an obligation upon his daughters. The fact that the expectation was in reference to all the property which the daughters might leave, including property not derived from the testator himself, was held to be important.

In *Briggs v. Penny*² Lord Chancellor Thurlow said: "I conceive the rule of construction to be, that words accompanying a gift or bequest expressive of confidence, or belief, or desire, or hope that a particular application will be made of such bequest, will be deemed to import a trust, upon these conditions: first, that they are so used as to exclude all option or discretion, in the party who is to act, as to his acting according to them or not; secondly, the subject must be certain; and thirdly, the objects expressed must not be too vague or indefinite to be enforced." In this case there was a gift of the residue of a personal estate to "S. P., her executors, administrators, and assigns, well knowing that she will make a good use, and dispose of it in a manner in accordance with my views and wishes." It was held that S. P. did not take for her own benefit, but that the words of bequest created a trust. In *Stead v. Mellor*³ the Master of the Rolls (Jessel) criticised this decision and said that it had never been followed. The will in *Stead v. Mellor* gave the residue of the testator's estate to his nieces, — "My desire being that they shall distribute such residue as they think will be most agreeable to my wishes." It was held that no trust was created. The Master of the Rolls said: "What is that but to make them the judges of the mode of distribution, and place the residue at their absolute disposal?"

¹ 2 M. & K. 197, decided by the Master of the Rolls.

² 3 MacN. & G. 546, 554.

³ L. R. 5 Ch. D. 225.

*In re Hutchinson & Tennant*¹ the testator gave all his property to his wife "absolutely, with full power for her to dispose of the same as she may think fit, for the benefit of my family, having full confidence that she will do so." It was held that the wife took absolutely, and that no trust was created. The Master of the Rolls said that these words were "merely an expression of the testator's wishes and belief as distinguished from a direction amounting to an obligation."

This case is in direct conflict with *Wright v. Atkyns*, *supra*, where Lord Eldon held that the words "in the fullest confidence" were imperative and created a trust.

180. In *Parnall v. Parnall*² the testator gave all his property to his wife, for her sole use and benefit, adding, "It is my wish that whatever property my wife might possess at her death be equally divided between my children." It was held that these words created no trust, and that the wife took absolutely. Vice-Chancellor Malins said: "In order to create a trust which can be carried into execution, there must be a definite subject-matter. Here the widow has a right to spend the whole of the property, and so there can be no trust affecting it."

This decision seems to be based more upon the circumstance last stated than upon the fact that the words "it is my wish" do not import a trust. The principle thus applied is an important one, and often decisive. If the devisee clearly has the right to dispose of the property in his lifetime, at his discretion, and the trust by its own terms applies only to what may happen to be left, if anything, in such a case the disposition is, owing to the uncertainty of the subject-matter, not to regard the devise as a trust.³

In *Lambe v. Elames*⁴ there was a devise to the testator's wife, "to be at her disposal in any way she may think best for the benefit of herself and family." It was held that this was an absolute gift, and that no trust was created

¹ L. R. 8 Ch. D. 540.

² L. R. 9 Ch. D. 96.

³ [*Tibbits v. Tibbits*, 19 Ves. 656, 664. See *infra*, p. 101.]

⁴ L. R. 6 Ch. App. 597.

which the court could give effect to, inasmuch as the wife might spend all the property.¹

181. I turn now to the American cases. In *Warner v. Bates*² a wife gave her property to her children, but the use and income of it to her husband during his life, "in the full confidence that upon my decease he will, as he has heretofore done, continue to give and afford my children [enumerating them] such protection, comfort, and support as they or either of them may stand in need of." She had three children by a former husband, and one child by her second husband, the devisee. They had all lived together for twenty-five years as one family, supported mainly by the wife's income. It was held that the above words subjected the use and income to a trust, which could be enforced in equity for the benefit of the children, including a son who had been turned out of doors by his stepfather, the devisee, shortly after the death of the testatrix.

In *Spooner v. Lovejoy*³ there was a devise of an estate to a wife, "to her own use, and to be disposed of at her decease according to the terms of any will or testamentary document that she may leave." This was held to vest the residue in her absolutely; and the following words, "she is of course to charge herself with the education and support of our daughters so long as they shall remain unmarried," were construed as not creating any trust or charge upon the property.

In *Hess v. Singler*⁴ the devise was to a son: "I hereby signify to my said son my desire and hope that he will so provide by will or otherwise that, in case he shall die leaving no lawful issue living, the property which he will take under this shall go in equal shares" to certain nieces and nephews named. It was held that these words created no trust, but merely expressed a wish, and that the son took absolutely. This was a very strong decision, being a clear departure from the law laid down in earlier cases.

¹ [*In re Thomson's Estate*, L. R. 13 Ch. D. 144; *Graves v. Graves*, 13 Ir. Ch. R. 182; *In re Adams*, L. R. 27 Ch. D. 394.] ² 98 Mass. 274.
³ 108 Mass. 529. ⁴ 114 Mass. 56.

In *Sears v. Cunningham*¹ there was a devise to a wife, "in her own name and for her own purposes, with only this condition, . . . that I wish, at the death of my wife, that she should make an equal division of her estate to such children as shall survive her or their representatives." It was held that the wife took absolutely.

In *Gibbins v. Shepard*² the gift was to the testator's wife, "leaving it as an injunction on her to divide it on the children at her death as she deems best and as they deserve." The court held that no trust was created in favor of the children.

In *Barrett v. Marsh*³ there was a devise to a testator's wife and daughters, followed by these words: "It is my desire that my property of whatever kind should, after the decease of my wife and daughters, descend to the children of my daughters respectively, if they are married." It was held that the daughters took absolutely.

182. In *Colton v. Colton*⁴ the testator gave all of his property to his wife, adding: "I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best." This language was held to create a trust in favor of the mother and sister.

The court said:—

"The question of its existence [the trust] after all depends upon the intention of the testator as expressed by the words he has used, according to their natural meaning, modified only by the context, and the situation and circumstances of the testator when he used them."⁵

183. So far as any definite rules can be extracted from the modern cases, I think they may be stated thus:—

1. Words expressing merely the hope, wish, belief, recommendation, or confidence of the testator, do not of themselves create a trust. In order to create a trust, these

¹ 122 Mass. 538.

² 125 Mass. 541.

³ 126 Mass. 213.

⁴ 127 U. S. 300, 312.

⁵ [*Bacon v. Ransom*, 139 Mass.

117; *Van Duyne v. Van Duyne*, 14 N. J. Eq. 397; In the Matter of *Pennock's Estate*, 20 Pa. St. 268; *Rowland v. Rowland*, 29 S. C. 54; *Lawrence v. Cooke*, 104 N. Y. 632.]

words must be accompanied by others clearly showing that the testator intended to impose an imperative direction upon the first taker, leaving him no option or discretion in the matter;¹ and where the language is doubtful, it will be held not to create a trust.²

2. Where the precatory words refer not only to the property which the devisee takes from the testator, but to all other property which the devisee may leave derived from other sources, the invariable rule is not to regard the words as creating a trust. It is not to be presumed that a testator would attempt absolutely to direct a devisee how he should leave his own property; and therefore if the precatory words refer in the same clause to such property as well as to that given by the testator, the conclusion necessarily is, that they are intended only in the way of advice or suggestion, and not as a positive direction.³

3. So, also, if the first taker has a right to spend all, or so much as he pleases, of the property, so that it depends upon him whether a residue, or, if any, how much, is left after his decease; in such a case the precatory words never create a trust.⁴ In all such cases there is no certainty whether there will be any property, or, if so, how much, to which the trust could apply.

4. Where the language is doubtful, if the persons referred to are the children of the testator, or those for whom, under the circumstances, he is bound to provide, a strong presump-

¹ [Knight v. Boughton, 11 Cl. & Fin. 513; Rose v. Porter, 141 Mass. 309; Gilbert v. Chapin, 19 Conn. 342; Thompson v. McKisick, 3 Humph. (Tenn.) 631; Bryan v. Howland, 98 Ill. 625; Burt v. Herron, 66 Pa. St. 400; Phillips v. Phillips, 112 N. Y. 197.]

² [Foose v. Whitmore, 82 N. Y. 405; Ellis v. Ellis, 15 Ala. 296; Van Amee v. Jackson, 35 Vt. 173; Negroes v. Plummer, 17 Md. 165; Clarke v. Leupp, 88 N. Y. 228.]

³ Lechmere v. Lavie, 2 M. & K. 167.

⁴ Parnall v. Parnall, L. R. 9 Ch. D. 96, *supra*; [Howard v. Carusi, 109 U. S. 725, 733; Durant v. Smith, 159 Mass. 229; Tibbits v. Tibbits, 19 Ves. 656; Church v. Disbrow, 52 Pa. St. 219; Williams v. Worthington, 49 Md. 572; Corby v. Corby, 85 Mo. 371; Mills v. Newbury, 112 Ill. 123. So, also, a trust is not created if the donee may in his discretion apply the property to some alternative object. Giles v. Anslow, 128 Ill. 187.]

tion arises that a trust in their favor was intended to be created.¹

5. In all cases the predominant inquiry is what was the real intent of the testator, and this is to be ascertained not only from the precatory clause, but from a full consideration of the whole will and of the circumstances and relations of the parties.²

Express Trusts defined by an Independent Writing.

184. I have treated thus far of express trusts as created, first, by deed; secondly, by a declaration of trust; and thirdly, by a will. But it happens sometimes that a testator makes a devise to A in trust, and then adds, "for the purposes which I have set forth in some other writing or memorandum," which he does not annex to, or embody in, his will. And sometimes there is no such memorandum, but the testator has communicated orally to the devisee the purposes and terms of the intended trust. What is the rule in these cases? It may be stated as follows:—

(1) Where the trust is set forth in a writing existing when the will is executed, and the testator refers in his will to such writing, so that it can clearly be identified, it becomes by such reference incorporated in, and an effective part of, the will; and the trusts therein stated are obligatory.³

This is the unanimous doctrine.⁴

It is to be noticed, first, that the writing must be in existence at the time when the will is executed,⁵ and, secondly, there must be no doubt as to its identity.⁶

¹ Colton v. Colton, 127 U. S. 300; Y. 369; Baker's Appeal, 107 Pa. St. [Elliot v. Elliot, 117 Ind. 380.] 381.]

² Warner v. Bates, 98 Mass. 274; ⁴ Singleton v. Tomlinson, 3 App. [Knight v. Knight, 3 Beav. 148; Cas. 404; Newton v. Seaman's Eberhardt v. Perolin, 48 N. J. Eq. Friend Society, 130 Mass. 91.]

592; Knox v. Knox, 59 Wis. 172; ⁵ [Van Straubenzee v. Monck, 3 1 Jarman on Wills, p. 356 and Sw. & Tr. 6; Langdon v. Astor, 16 note. See, on the general subject N. Y. 9.]

of precatory words, 2 Pomeroy's ⁶ [Baker's Appeal, 107 Pa. St. Eq. § 1014.] 381; Chambers v. McDaniel, 6

³ [Habergham v. Vincent, 2 Ves. Iredell (N. C.), 226. See, also, 1 Jr. 228; Allen v. Maddock, 11 Moore Jarman on Wills, p. 98 and note.] P. C. 427; Brown v. Clark, 77 N.

Express Trusts defined orally.

185. (2) If a testator makes a devise or bequest upon trusts not defined in the will, nor in any writing made a part thereof, but orally communicated to the devisee or legatee, and this is stated in the will, such trusts in England may be proved orally and will be enforced.¹

In Massachusetts, however, the rule is just the reverse, as was settled in *Oliffe v. Wells*.² This was a hard case. The testator had made a will containing a devise to the executor, the Rev. Mr. Wells, of certain property, "to distribute the same in such manner as in his discretion shall appear best calculated to carry out wishes which I have expressed to him or may express to him."

The proof was, that the testator directed Mr. Wells to apply the property chiefly for the benefit of the deserving poor, aged, and infirm connected with St. Stephen's Mission Chapel, of which Mr. Wells was rector. The court refused to establish the trust by the parol evidence, and the property went to the next of kin or heirs at law.³

¹ Fleetwood's Case, L. R. 15 Ch. D. 594, where the cases are reviewed. [Following the English rule is *Curdy v. Berton*, 79 Cal. 420.]

² 130 Mass. 221.

³ [The principle upon which this case was decided may perhaps be stated thus : If A procures an absolute devise to himself by an oral promise to hold the property as a trustee for certain others, and then after the testator's death refuses to carry out his promise, a trust arises by reason of the fraud, and the oral evidence is admitted to establish it: *Vreeland v. Williams*, 32 N. J. Eq. 734; *Hoge v. Hoge*, 1 Watts, 163, 214; *Hooker v. Oxford*, 33 Mich. 453; *Browne v. Browne*, 1 H. & J. (Md.) 430; *Dowd v. Tucker*, 41 Conn. 197.

But supposing that A procures a devise to himself "in trust," the ob-

ject of the trust not being stated in the will. In the absence of oral evidence, the trust would be void, and the property would go to the heirs or next of kin. Of that property they ought not to be deprived by any testamentary act of the testator not manifested in conformity to law; and hence oral testimony to prove that the trust was for some stranger should not be admitted. In the case first supposed, if parol evidence were not admitted, a fraud would be perpetrated; whereas, in the second case, to admit oral evidence would open a door to fraud. But when the directions which determine the alleged trust are given after the will is made, they are clearly within the statute of frauds, whether they be oral or written. *Johnson v. Ball*, 5 De G. & S. 85; *Thayer v. Wellington*, 9 Allen, 283.]

CHAPTER IX.

GIFTS AND VOLUNTARY SETTLEMENTS.

186. ANOTHER mode in which express trusts may be created is by voluntary settlements and gifts. By "voluntary" is meant "without consideration," — that is, a gift made from favor, friendship, affection, or other similar motive.

Every man has a legal right to give away his property or any part of it in his lifetime, provided only that by so doing he does not interfere with the rights of his creditors. No voluntary conveyance of property is good which defeats the claims of existing creditors; but, subject to this qualification, the *jus disponendi* which inheres in the ownership of property authorizes voluntary transfers or gifts, as well as transfers for a valuable or pecuniary consideration.

In treating of voluntary settlements and gifts, as distinguished from gifts by last will, a leading distinction is, that wills take effect from the death of the testator; until then they are of no force, and may be revoked by him at any time. Whereas a gift or settlement *inter vivos* must take effect at once, if at all. If the gift is by deed, the deed must operate immediately to convey all that it purports to convey.

A voluntary settlement may be made, as we shall see, subject to the power of revocation; but such power of revocation must be reserved in the deed itself, and it becomes a part of, and thus qualifies, the grant therein made.¹

187. Keeping in mind, then, this leading distinction between voluntary settlements and last wills and testaments, let us briefly consider the main points affecting trusts arising under voluntary settlements. A man may transfer his property, without valuable consideration, in any one of three ways: —

(1) He may do such acts as amount in law to a convey-

¹ [Mayor of Baltimore v. Williams, 6 Md. 235. See *infra*, p. 125.]

ance, transfer, or assignment of the property directly to his beneficiary, and thus completely divest himself of the legal ownership, and by the same act vest the legal title and all the beneficial interest in his beneficiary.¹ This is accomplished by a conveyance or assignment directly by A, the donor, to B, the donee, without the interposition of any trustee; or, in case of personal property capable of manual delivery, by a manual and actual delivery of the property to the donee, or to some third person for him.

(2) By making such conveyance, not directly to the donee, but to a trustee who is to hold the property for the benefit of the donee or beneficiary.²

(3) The legal owner of the property may himself retain the legal title and possession of the same, and constitute himself a trustee thereof for the benefit of his beneficiary by declaring in some valid method that he holds it thereafter in trust for such other person.³

If either one of these methods has been adopted — if (1) a complete transfer of the property has been made, so that nothing remains to be done in order to divest the donor of it and to vest it in the donee; or if the owner has (2) constituted himself or (3) some third person a trustee of the property, so that no step remains to be taken in order to create the trust — a court of equity will give effect to the gift or voluntary trust, and uphold it as against all comers except creditors and *bonâ fide* purchasers without notice. In short, the gift must have become consummated and complete, so that nothing remains to be done by the donor to give it full effect.⁴

¹ [Bennett v. Bedford Bank, 11 Mass. 421.]

² [Kilpin v. Kilpin, 1 My. & K. 520; Union Mutual Life Ins. Co. v. Spaid, 99 Ill. 249; Gassett v. Grout, 4 Met. 486.]

³ [Cox v. Hill, 6 Md. 274; Martin v. Funk, 75 N. Y. 134; Tyler v. Tyler, 25 Ill. App. 333.]

⁴ [Stewart v. Hidden, 13 Minn. 43; Lane v. Ewing, 31 Mo. 75;

Massey v. Huntington, 118 Ill. 80. A man credited his wife with \$3,000 on his books, and with interest thereon from time to time until his death. This was held to be a completed gift: Crawford's Appeal, 61 Pa. St. 52. See, also, McNulty v. Cooper, 3 Gill & J. 214; Crompton v. Vassar, 19 Ala. 259; Padfield v. Padfield, 68 Ill. 210.]

188. On the other hand, it is equally well settled that a court of equity will not lend its aid to complete or enforce a gift imperfectly made, or a voluntary trust not completely and validly created.¹

In the leading modern case upon this subject, *Milroy v. Lord*,² the principle is thus stated by Lord Justice Turner: "I take the law of this court to be well settled that, in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intends to provide, . . . and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; but in order to render the settlement binding, one or other of these modes must, as I understand the law of this court, be resorted to, for there is no equity in this court to perfect an imperfect gift."

In a more recent case, *Richards v. Delbridge*,³ Jessel, Master of the Rolls, said (quoting from Vice-Chancellor Bacon): "The one thing necessary to give validity to a

¹ [Dorsey v. Packwood, 12 How. 126; Wadd v. Hazelton, 137 N. Y. 216; Crompton v. Vassar, 19 Ala. 259. A donor directed his intended trustee to draw up a trust deed, and to buy certain stock to be held under the deed. These things were done, but the deed was not signed or delivered. The court held that no trust was created: Lloyd v. Brooks, 34 Md. 27.

A parol release of a debt is not sufficient: Doty v. Wilson, 5 Lans. (N. Y.) 7. The gift of a chose in action without delivery, to take effect upon the death of the donor, is not a complete gift: Lonsdale's Es-

tate, 29 Pa. St. 407. The owner of a promissory note transferred it by a separate paper, but there was no delivery or indorsement. This was held not to be a valid gift: Badgley v. Votrain, 68 Ill. 25. To the same effect is Henderson v. Henderson, 21 Mo. 379, where the authorities are reviewed. Where a brother bought land for his sister with his own money, but took the title in his own name, it was held that the trust was unexecuted: Lowry v. McGee, 3 Head (Tenn.), 269. See 2 Pomeroey's Eq. § 997 *et seq.* and notes.]

² 4 De G., F. & J. 264, 274.

³ L. R. 18 Eq. Cas. 15

declaration of trust — the indispensable thing — I take to be, that the donor or grantor, or whatever he may be called, should have absolutely parted with that interest which had been his up to the time of the declaration, — should have effectually changed his right in that respect and put the property out of his power, at least in the way of interest.”

189. The Supreme Court of Massachusetts have given their approval of the doctrine in these words: ¹ “The equitable principle is now well established, and uniformly acted on by courts of chancery, that a voluntary gift or conveyance of property in trust, when fully completed and executed, will be regarded as valid, and its provisions will be enforced and carried into effect against all persons except creditors or *bonâ fide* purchasers without notice. It is certainly true that a court of equity will lend no assistance toward perfecting a voluntary contract or agreement for the creation of a trust, nor regard it as binding so long as it remains executory. But it is equally true that, if such an agreement or contract be executed by a conveyance of property in trust, so that nothing remains to be done by the grantor or donor to complete the transfer of title, the relation of trustee and *cestui que trust* is deemed to be established, and the equitable rights and interests arising out of the conveyance, though made without consideration, will be enforced in chancery.”

190. Another well-settled principle bearing on the matter of voluntary settlements is that, where the donor has intended to make an outright gift to his beneficiary and has done it imperfectly, — that is, has not done acts sufficient in law to amount to a transfer, — the court will not help the matter by treating the imperfect gift as a declaration of trust, nor by treating the donor as a trustee for his intended donee. Nor will it carry out an imperfect declaration of trust by converting it into a gift. In a word, where the donor has attempted to confer his bounty in a particular mode, but has done it insufficiently, equity will not assist by converting what was intended as an absolute gift into a

¹ *Stone v. Hackett*, 12 Gray, 227.

trust, nor *vice versâ*, by converting what was intended as a trust into a gift.¹

The doctrine was thus stated by Lord Justice Turner in *Milroy v. Lord*:² "If the settlement is intended to be effectuated by one of the modes to which I have referred [a transfer to the donee, or to a trustee, or declaring himself trustee], the court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust." In a subsequent case, Sir George Jessel, Master of the Rolls, declared, "This statement contains the whole law on the subject."

191. The reason and good sense of the distinction are plain. For a voluntary donor to become a trustee, two things must concur, — first, the intention to make himself a trustee, and, secondly, a sufficient expression of that intention; whereas words importing a present gift show an intention not to be a trustee, but to give the whole property to another, and not to retain it in the donor's own hands for any purpose, fiduciary or otherwise. The attempt to make an outright gift is utterly inconsistent with the intention of becoming a trustee of the same property; and therefore a court of equity will not, even for the purpose of preserving a donor's bounty from utter failure, impute to him a relation which he did not intend to assume.

192. It is a fundamental rule upon this subject, that the transfer itself, whether to the donee or to a trustee, must

¹ [*Antrobus v. Smith*, 12 Ves. 39; *Young v. Young*, 80 N. Y. 422; *Flanders v. Blandy*, 45 Ohio St. 108. But see *Ellis v. Secor*, 31 Mich. 185. As between husband and wife, the rule is somewhat different. Where the husband has made a gift to his wife (of real or personal property, as, for instance, by a deed) which would be good as between other persons, but which is bad at com-

mon law as between them, — in such a case equity interposes, and makes the attempted gift effectual by constituting the husband a trustee for his wife. See *infra*, p. 486, and also *Garner v. Garner*, Busbee (N. C.) Eq. 1; *Turner v. Shaw*, 96 Mo. 22; *Deming v. Williams*, 26 Conn. 226; *Huber v. Huber*, 10 Ohio, 371.]

² 4 De G., F. & J. 264, 274.

include every requisite which is necessary to transfer property of that character from one person to another. There must be a complete divesting of the property out of the donor, and it must be as completely transferred to the donee, or to a trustee for him.¹

For example, if the property be a personal chattel and a gift be intended, actual delivery is necessary.² There must be a transfer of possession, as well as the expression of an intent to give. If, however, the donor intends to hold the property as trustee, he may retain the possession, provided that he suitably declares his intention thenceforth to hold the property as trustee for his beneficiary.

If stocks, notes, or other choses in action constitute the property intended to be given, the donor must do everything which is necessary to transfer the title out of himself and into his proposed donee or trustee.³

In the case of personal property an oral declaration of the trust is sufficient, because, as we have seen, trusts relating to personal property may be created and proved by parol. In the case of real estate a sufficient deed must be made. The court will never enforce a mere voluntary agreement to convey, nor assist a defective deed. The instrument of transfer must be complete.

193. If, however, the donor proposes to constitute himself the trustee of real estate, a simple written declaration to that effect, though unsealed, is sufficient, because, by the statute of frauds, any writing properly signed is sufficient to create or manifest a trust.⁴ A deed under seal, therefore, is not necessary.

194. An important question arises here, Is delivery of a deed constituting a voluntary settlement essential to its validity? The ordinary rule is, that delivery is essential to the validity of a deed.⁵ It takes effect only upon delivery,

¹ [See *supra*, p. 104.]

⁴ [See *supra*, p. 87.]

² [Noble v. Smith, 2 Johns. 52; Scott v. Lauman, 104 Pa. St. 593; Carleton v. Lovejoy, 54 Me. 445; Richardson v. Hadsall, 106 Ill. 476; Phipps v. Hope, 16 Ohio St. 586.]

⁵ [Blight v. Schenck, 10 Pa. St. 285; Church v. Gilman, 15 Wend. 656; Johnson v. Farley, 45 N. H. 505; Stiles v. Brown, 16 Vt. 563; Bryan v. Wash, 7 Ill. 557.]

³ [See *infra*, p. 120.]

such delivery being equivalent to livery of seizin. Under voluntary settlements, it becomes a question of intention.¹ Did the donor by retaining the deed intend to hold his gift in suspense and within his own control, or is such retention, under the circumstances, consistent with an intent that the deed should take effect? The prevailing doctrine may, I think, be stated in three propositions:—

(1) If the donor has made himself the trustee in the voluntary settlement, then his retention of the deed is consistent with the idea of an intended complete gift, and the gift will be held valid, unless there is clear evidence of a contrary intention.²

(2) Although the donor retains possession of the deed made by him to the beneficiary or to a trustee, yet if he has put it on record, and, again, if he has made any statements recognizing this provision for the beneficiary, equity will give effect to the deed.³ *Adams v. Adams*⁴ is a very strong case on this point. One Adams executed a deed, his wife joining, of the house in which they lived, to a trustee for the benefit of his wife, and of her children after her death. Adams recorded the deed, and frequently spoke of it as a provision for his wife, but he did not deliver the deed, nor inform the trustee that such a deed had been made. Some years later, the parties having been divorced, Mrs. Adams brought a bill to have the deed established. The court held that a valid trust had been created, and that a new trustee should be appointed, the trustee named in the deed having declined to act.⁵

(3) A voluntary settlement fairly made is always binding in equity upon the grantor, unless there be clear and decisive

¹ [*Vreeland v. Vreeland*, 48 N. J. Eq. 56; *Newton v. Bealer*, 41 Iowa, 334, and cases cited *infra*.] to be cancelled, although it had been recorded.]

² [See *Perry on Trusts*, § 103.]

⁴ 21 Wall. 185.

³ *Jones v. Jones*, 6 Conn. 111; *Cecil v. Beaver*, 28 Iowa, 241. See also, *Union Mut. Ins. Co. v. Campbell*, 95 Ill. 267. In *Becket v. Heston*, 49 N. J. Eq. 510, under the peculiar circumstances of the case, the court ordered a voluntary deed

⁵ [*Exton v. Scott*, 6 Sim. 31; *Hall v. Palmer*, 3 Hare, 532; *In re Way's Trusts*, 2 De G., J. & S. 365 (in this case, moreover, there was no notice either to the trustee or to the *cestui que trust*); *Otis v. Beckwith*, 49 Ill. 121; *Bunn v. Winthrop*, 1 Johns. Ch. 329.]

proof that he never parted nor intended to part with the possession of the deed ; and, even if he retain it, the weight of authority is decidedly in favor of its validity, unless there be other circumstances, besides the mere fact of his retaining it, to show that it was not intended to be absolute.¹

The rule was thus stated by Chancellor Kent in *Souverby v. Arden*,² and his statement was approved by the United States Supreme Court in *Adams v. Adams*, *supra*.

195. In Massachusetts the tendency, I think, is to narrow the effect of a voluntary deed. The precise point now before us has not arisen, but analogous questions have arisen, and, so far as I can extract a rule from the cases, it is this : No effect will be given to a voluntary deed where it has been retained by the donor and nothing more appears.³ To render it effectual, other facts must appear showing that the intent of the donor was that it should take effect as a gift ; and oral declarations of his design by the donor, or placing the deed upon record, would be proof of such an intention.

The whole difference between the rule as commonly adopted and the Massachusetts rule may be stated thus : By the former, a voluntary settlement properly executed, although not delivered, of itself imports an intention that it should take effect ; whereas, by the Massachusetts rule, such a voluntary deed, without delivery or other evidence of intent, imports nothing. Massachusetts cases bearing on this point are, *Brabrook v. Boston Five Cents Saving Bank*,⁴ *Scott v. Berkshire County Savings Bank*.⁵ In *Gerrish v. New Bedford Institution* ⁶ Judge Colt said : “ Where there is a formal instrument creating a trust in real estate, it is said that delivery of the writing is not in all cases necessary to its validity.”

196. Where a voluntary settlement is made by a conveyance to a trustee for the benefit of the beneficiary, notice to the trustee and acceptance by him of the trust are not neces-

¹ [Colton v. King, 2 P. Wms. 358 ; Am. Dec. 671 ; Stow v. Miller, 16 Antrobus v. Smith, 12 Ves. 39 ; Iowa, 460 ; Lang v. Smith, 37 W Brown v. Brown, 66 Me. 316.] Va. 725.]

² 1 Johns. Ch. 240, 256.

⁴ 104 Mass. 228.

³ [See, also, Wood v. Ingraham,

⁵ 140 Mass. 157.

3 Strob.'s Eq. (S. C.) 105, s. c. 51

⁶ 128 Mass. 159.

sary to the validity of the settlement.¹ It is true that no one can be forced into the position of a trustee against his desire, but it is equally true that equity will never allow a trust, properly created in other respects, to fail for want of a trustee; and therefore, if the transaction is otherwise complete, equity will appoint a trustee in the place of the one declining to serve.²

Nor is notice of the trust to the beneficiary essential to its validity.³

197. Another important question arises in this connection, Is actual acceptance by the donee of a voluntary settlement or gift necessary to its validity? Here again the courts divide. The rule as commonly adopted is, that, where the transfer or gift is otherwise complete, knowledge or actual acceptance thereof by the donee is not necessary to its validity.⁴ His acceptance will be presumed, unless and until he repudiates the gift. This is the well-settled English doctrine, and has been such for many years.

There was a gift made in 1880 by a widow then eighty-six years of age. In 1882, having remarried, she attempted to recall the gift, which was a transfer of consols to the value of £1,000. Her original intent was to make a gift of the securities to the defendant, but to receive the income during her life. The defendant did not know of the gift until he was asked to retransfer the consols. He refused to do so, and the court held that the gift was valid.⁵

198. A contrary decision was made in *Scott v. Berkshire County Savings Bank*,⁶ where it was held that a deposit of funds in a savings bank by the donor in the name of the

¹ [Donaldson v. Donaldson, Kay, 711; Fletcher v. Fletcher, 4 Hare, 67; Minot v. Tilton, 64 N. H. 371.]

² Tierney v. Wood, 19 Beav. 330; Adams v. Adams, 21 Wall. 185.

³ Tate v. Leithead, Kay, 658.

⁴ [1 Perry on Trusts, § 105; *In re Way's Trusts*, 2 De G., J. & S. 365; *Masterson v. Cheek*, 23 Ill. 72. See, also, *infra*, p. 122, as to Savings Bank Deposits.

Where the conveyance is for a valuable consideration, acceptance is necessary. *Jackson v. Richards*, 6 Cowen, 617; *Mitchell v. Ryan*, 3 Ohio St. 377; *Woodbury v. Fisher*, 20 Ind. 387.]

⁵ *Siggers v. Evans*, 5 E. & B. 367, 380. See, also, *Standing v. Bowring*, L. R. 31 Ch. D. 282.

⁶ 140 Mass. 157.

donee did not pass the funds to the donee without actual acceptance of the gift by him in the lifetime of the donor. The court laid down the rule that assent was not legally presumed, but that actual acceptance must be proved. No cases are cited; the English authorities running back three hundred years are not referred to; nor is there any discussion of the subject.¹

A voluntary settlement may be made in trust for the benefit of the settlor himself (where the rights of creditors are not infringed) as well as for others. "The fact that by the terms of the deed the income of the property is to be applied to the benefit of the settlor during his lifetime does not impair the validity or effect of the further trusts declared in the instrument."² This doctrine is well settled.

199. Having thus ascertained the general principles governing this subject, let us glance at a few of the chief cases in which complete and incomplete settlements and gifts have been considered. The leading case is *Ellison v. Ellison*.³ The settlor had an interest in some mining or colliery shares, of which he made a voluntary settlement. After his death a bill was brought to enforce the trust, and it was sustained. Lord Eldon said: "I take the distinction to be, that if you want the assistance of the court to constitute you *cestui que trust* and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you *cestui que trust*; as upon a covenant to transfer stock, etc., if it rests in covenant and is purely voluntary, this court will not execute that voluntary covenant. But if the party has completely transferred stock, etc., though it is voluntary, yet, the legal conveyance being effectually made, the equitable interest will be enforced by this court."

This has been the keynote of all the decisions on the subject ever since. The only difficulty has been to apply the principle thus clearly laid down.

200. In *Ex parte Pye*,⁴ M, by letter, had directed his at-

¹ [See *Parkman v. Suffolk Savings Bank*, 151 Mass. 218.]

² *Viney v. Abbott*, 109 Mass. 300, and cases cited.

³ 6 Ves. 656.

⁴ 18 Ves. 140, 150.

torney to purchase an annuity for a certain woman, which was done, but in the name of M. M then sent a power of attorney to his agent authorizing him to transfer the annuity to the woman's name, but before this was done M died. Lord Eldon held that, although the legal interest remained in M, he had constituted himself a trustee for the beneficiary, saying: "Upon the documents before me, . . . he has committed to writing what seems to me a sufficient declaration that he held this part of the estate in trust for the annuitant."

201. *Antrobus v. Smith*¹ is a leading case of incomplete gift. There a father owning an interest in a navigation company attempted to make a legal assignment of it to his daughter. It was admitted that, as a legal assignment of his interest, it was insufficient in form.

Sir Samuel Romilly argued that the father intended to make himself a trustee for his daughter of these shares. The Master of the Rolls [Sir William Grant] refused to take this view and said: "He [the father] was not otherwise a trustee than as any man may be called so who professes to give property by an instrument incapable of conveying it. He was not in form declared a trustee; nor was that mode of doing what he proposed in his contemplation. He meant a gift. He says he assigns the property. But it was a gift not complete. The property was not transferred by the act. . . . There is no case in which a party has been compelled to perfect a gift which, in the mode of making it, he has left imperfect. There is *locus penitentie* so long as it is incomplete."

202. So, also, it has been held that a memorandum not under seal, by which the obligee attempted to transfer a bond to a beneficiary, was incomplete as a gift, although the bond was at the same time delivered to the beneficiary. The court held that it could not give effect to the memorandum.² In *Dillon v. Coppin*,³ where an insufficient assignment of East India stock and of shares in an insurance

¹ 12 Ves. 39, 46.

American cases *contra* will be noticed presently.

² Lord Cottenham in *Edwards v. Jones*, 1 Myl. & Cr. 226. Certain

³ 4 Myl. & Cr. 647.

company was made, Lord Cottenham held that the gift was imperfect, and that nothing passed from the settlor.¹

203. In *Searle v. Law*² A made a voluntary assignment of certain bonds and shares to B in trust for himself for life, and after his death for his nephew. He delivered the bonds and shares to B, but did not comply with the requirements of law which were necessary to make the assignment effectual. It was held by Vice-Chancellor Shadwell that no interest passed by the assignment to the trustee; and he used this significant language, showing how strictly the rule is observed:—

“If [A] had not attempted to make any assignment of either the bonds or the shares, but had simply declared in writing that he would hold them upon the same trusts as are expressed in the deed, that declaration would have been binding upon him. . . . But it is evident that he had no intention whatever of being himself a trustee for any one, and that he meant all the persons named in the deed as *cestuis que trustent* to take the provisions intended for them through the operation of that deed. He omitted, however, to take the proper steps to make that deed an effectual assignment; and therefore both the legal and the beneficial interest in the bonds and share vested in him at his death.”

In *Fortescue v. Barnett*³ there was an assignment to trustees of a policy of insurance upon the life of the assignor, he retaining the policy. The assignment was complete, but no notice was given to the insurance company. Subsequently the assignor surrendered the policy to the company for a valuable consideration; and it was held that he must account for its value, inasmuch as nothing remained to be done by the assignor to give effect to his assignment.

204. *Kekewich v. Manning*⁴ was a carefully considered case, which has been much commented upon. A bequest of money in the funds was given to a mother and daughter in trust for the mother for life, and at her death to the daughter absolutely. During the life of her mother the daughter, in anticipation of marriage, made a voluntary

¹ See, also, *Milroy v. Lord*, 4 De G., F. & J. 264, and *infra*, p. 121.

² 15 Sim. 95.

³ 3 M. & K. 36.

⁴ 1 De G. M. & G. 176.

assignment of her interest under the will in trust for the issue of the marriage, and, in default thereof, for a niece of the daughter. In this assignment her intended husband joined, but her mother did not join. The husband died without issue, and the question was, whether this constituted a valid settlement. The court held that it was a valid and sufficient transfer to the trustees, and a sufficient declaration of trust of the interest of the daughter, although the mother, who jointly held the legal title with her, had not joined in the assignment. The court held that the daughter had done all that it was "in her power or competency to do" to transfer her interest, and that this intention could not be defeated because the mother had not agreed to hold the legal title for the new beneficiary.

The court remarked upon this point (page 198): "Can a trustee by saying, 'I refuse to accept a trusteeship for the new claimant to a participation in the beneficial interest whom you, my *cestui que trust*, have introduced, or endeavored to introduce. I object to the claim and oppose it. I will not deal with the legal title, nor shall you.' Can a trustee, we repeat, by thus saying and thus acting, prevent the *cestui que trust* from making an effectual gift of his interest in the trust property, or any part of it? Surely not."

205. This case settles two points which I have stated already: (1) The interest of a *cestui que trust* in property already held in trust may in its turn be the subject of another valid settlement or declaration of trust; (2) The concurrence of the trustee who holds the legal title, or his agreement to hold the property upon the new trust thus created, is not necessary to the validity of the transaction.

A trustee can never trammel or limit the right of his *cestui que trust* to make any lawful disposition of the latter's equitable interest. He may resign the trusteeship, but he cannot defeat the transfer.¹

206. I come next to the leading case of *Milroy v. Lord*.²

¹ [Voyle v. Hughes, 2 Sm. & Gif. 123; Rycroft v. Christy, 3 Beav. 18; Woodford v. Charnley, 28 Beav. 238.]

96; Collinson v. Patrick, 2 Keen, ² L. J. J. 1862, 4 De G., F. & J. 264.

M, the donor, executed a voluntary deed purporting to assign to L, as trustee, certain shares in a bank, to be held by L in trust for the plaintiff. The shares were transferable only by entry on the books of the bank, but no such transfer was ever made. L, the trustee, held from M, the donor, a power of attorney, authorizing him, as his agent, to transfer the said shares, and also to collect the dividends. L collected the dividends and remitted them, sometimes directly to the plaintiff and sometimes through M. M, the donor, died without having made any further transfer. It was held by the court, first, that as it was clearly not the intention of the settlor, M, to constitute himself a trustee of the shares, but to vest the trust in L as trustee, there was no valid trust of the shares created by the settlor, inasmuch as no valid and complete transfer of the shares had been made by M to L; "the settlor had not done everything which, according to the nature of the property, was necessary to be done in order to transfer the property and render the settlement binding upon him." Secondly, the court held that although L, under his power of attorney, might have transferred the shares to himself, yet he had not done so, and was not bound to do so without a direction to that effect from the settlor. "A court of equity could not decree the agent of the settlor to make the transfer unless it could decree the settlor himself to do so, and it is plain that no such decree could have been made against the settlor."

207. Next comes *Richardson v. Richardson*,¹ which is in conflict with some of the preceding cases, and which is discredited by subsequent cases. E, by a voluntary deed, assigned certain specified property, "and all other the personal estate . . . of her the said E to R, absolutely, with authority to R, as her attorney, to sue for and recover all the aforesaid premises, but for the sole benefit of R." E had some promissory notes to her order, not named in the instrument and not indorsed by her, but upon R's death they were found in his possession. It was held that the notes belonged to R, on the principle that the assignment operated as a complete declaration of trust by E, of all her property in favor of R.

¹ L. R. 3 Eq. Cas. 686, decided by Vice-Chancellor Wood.

Another case, the authority of which has been denied, is *Morgan v. Malleson*,¹ decided by Lord Romilly, Master of the Rolls. The memorandum relied upon was as follows: "I hereby give and make over to Dr. Morris an India bond, No. D. 506, value £1,000, as some token for all his very kind attention to me during illness." This was signed by the donor. The bond, which was transferable by delivery, remained in the possession of the donor. The Master of the Rolls said: "I am of opinion that the paper writing . . . is equivalent to a declaration of trust."

208. The two preceding cases are discredited by the two following cases: *Warriner v. Rogers*,² where it was said by Vice-Chancellor Bacon: "The one thing necessary to give validity to a declaration of trust . . . I take to be, that the donor or grantor, or whatever he may be called, should have absolutely parted with that interest which had been his up to the time of the declaration, should have effectually changed his right in that respect, and put the property out of his power, at least in the way of interest." In this case a box had been given by a woman to her servant, she retaining the key. The box contained deeds, etc., and a paper to the effect that the property was to become the servant's upon the death of the donor. It was held that there was no intent to make a gift, and that the paper in the box was of a testamentary character and void.

In *Richards v. Delbridge*³ D, who owned the lease and stock in trade of a mill, executed the following memorandum on the lease: "This deed and all thereto belonging I give to E [his grandson] from this time forth, with all the stock in trade." This was held to be incomplete as a gift, and not valid as a declaration of trust in favor of E.

In *Breton v. Woollven*⁴ a husband wrote and delivered to his wife three letters stating that he gave her the furniture and other articles in the house for her sole and absolute use. The furniture and other articles were used by them in the ordinary way, and were in the house at the time of his death. It was held, first, that the husband intended to make a gift

¹ L. R. 10 Eq. Cas. 475.

² L. R. 16 Eq. Cas. 340.

³ L. R. 18 Eq. Cas. 11.

⁴ L. R. 17 Ch. D. 416.

to his wife ; secondly, that he did not intend to make himself a trustee for his wife of the furniture, etc., and that his letters did not constitute a declaration of such a trust ; thirdly, it was held that, as the gift was incomplete and invalid, nothing passed to the wife. But, in the course of his opinion, Vice-Chancellor Hall said, "It is a monstrous state of the law which prevents effect being given to such a gift."

209. The English doctrine in reference to voluntary settlements is fully adopted in Massachusetts, and prevails generally in this country.¹

210. But the stringency of the English rule has materially been modified in reference to promissory notes and corporate shares.

AS TO PROMISSORY NOTES. — (a) It is well settled that the holder of the note of a third person may make a good gift of it either *inter vivos*, or as *donatio causa mortis*.²

(b) The delivery of such a note to the donee or to some one for him with the intent to give it to him, although it is not indorsed by the donor so as to pass the legal title, is a valid and complete gift, because such a delivery authorizes the donee to sue upon it in the name of his donor, or of the donor's executor or administrator.³

211. Where the note is payable to the order of the donor and he fails to indorse it, it may indeed be said that he has not done all that is necessary to pass the legal title to the donee, and so the gift would come under the ban of the numerous cases which we have considered. But our courts hold that such gift and delivery carry with them the right to sue in the donor's name, and thus the technical difficulty is obviated. If the note be payable to bearer, or is already

¹ *Stone v. Hackett*, 12 Gray, 227; [*Marston v. Marston*, 21 N. H. 491; *Viney v. Abbott*, 109 Mass. 300; *Caldwell v. Renfrew*, 33 Vt. 213; *Sewall v. Roberts*, 115 Mass. 262. *Turpin v. Thompson*, 2 Met. (Ky.)

² [*Corle v. Monkhouse*, 50 N. J. 420; *Coutant v. Schuyler*, 1 Paige, 316; *Veal v. Veal*, 27 Beav. 303. *Eq.* 537.]

³ *Grover v. Grover*, 24 Pick. 261; *Contra*, *Bradley v. Hunt*, 5 Gill & J. Bates *v.* *Kempton*, 7 Gray, 382; 54; s. c. 23 Am. Dec. 593, note, and *Chase v. Redding*, 13 Gray, 418; cases cited.]

indorsed in blank, then of course no difficulty arises, inasmuch as the legal title passes by delivery.

212. But a gift of the donor's own note is invalid. As a note, it is void because without consideration; and as a mere promise to give, it has no force, either at law or in equity.¹

In *In re Richards*² it was held that a man may make a valid gift of his own note to be delivered after his death. But this decision was questioned and overruled by Lord Justice Cotton,³ who said: "Neither in law nor in equity can the payee under a promissory note, which appears on the facts before the court to be voluntary, have any claim as a creditor."

213. AS TO CORPORATE SHARES. — If the donor has delivered to the donee a certificate of stock, with a transfer to the donee indorsed thereon, or a power of attorney to the donee to make the transfer, this ordinarily is sufficient, although no transfer has been made upon the books of the company. In such a case nothing remains for the donor to do in order to divest himself of the property.⁴ This was the situation in *Stone v. Hackett*.⁵

If, however, the statute law or the charter of the corporation provides that no transfer shall be made except by a writing signed upon the books of the company, then, as we have seen, this must have been done, or the gift fails.⁶

214. By a statute of Massachusetts⁷ the delivery of the

¹ *Basket v. Hassell*, 107 U. S. 602; [*Harris v. Clark*, 3 N. Y. 93, overruling *Wright v. Wright*, 1 Cow. 598; *Copp v. Sawyer*, 6 N. H. 386; *Raymond v. Sellick*, 10 Conn. 480; *Holley v. Adams*, 16 Vt. 206; *Blanchard v. Williamson*, 70 Ill. 647. In *Hewitt v. Kaye* (L. R. 6 Eq. 198) it was held that a check upon the donor's banker, not presented for payment till after his death, did not constitute a valid gift.]

² L. R. 36 Ch. D. 541.

³ *In re Whitaker*, L. R. 42 Ch. D. 119.

⁴ [*Grymes v. Hone*, 49 N. Y. 17. So, where there was no written transfer or power of attorney, it was held that the gift was not completed. *Matthews v. Hoagland*, 48 N. J. Eq. 455.]

⁵ 12 Gray, 227, above cited.

⁶ [*Pennington v. Gittings*, 2 Gill & J. 208; *Baltimore Retort & Fire Brick Co. v. Mali*, 65 Md. 93. But see *Reed v. Copeland*, 50 Conn. 472, where, however, there seems to have been a valid consideration.]

⁷ 1884, ch. 229.

certificate to a *bonâ fide* purchaser, with a written transfer, or written power of attorney, signed by the owner, is made a sufficient transfer "as against all parties," without any record upon the books of the corporation.

On the other hand, where the owner of stock transfers it to himself as trustee for another, *e. g.* A B, but retains the certificate, receives the dividends, and makes no disclosure to A B, this does not amount, in Massachusetts, to a gift of the stock, and upon the death of such original owner the stock belongs to his estate and not to A B. In *Cummings v. Bramhall*¹ the court held that these facts do not sufficiently show an intention to make a gift, even in the case of a father and his daughter.

215. Upon the whole, the American doctrine in reference to corporate shares, promissory notes, and other choses in action may be stated thus: (1) The intent of the donor to make a gift must be clear, and such an intent will not be inferred from the mere fact that the owner of stock has transferred it to his own name as trustee for another.

(2) It is not necessary in the case of notes that the legal title should have been transferred to the donee; but where the donor has not made himself the trustee, the instrument itself must have been delivered to the donee, or to some third person for him, so as to invest him with an equitable title, and with the right to sue upon the instrument in the name of the donor or of his legal representatives. The delivery of the instrument as a gift carries with it the right to sue upon it in the name of the donor if necessary.

(3) The gift is incomplete if anything remains to be done by the donor in order to divest himself of the property; as where, by the rules of a corporation, no transfer of stock can be made except by a transfer on the books of the corporation signed by the assignor. This doctrine is thus stated substantially in *Basket v. Hassell*.²

The mere fact that some formality has been omitted will not defeat the gift, if nothing remains to be done by the

¹ 120 Mass. 552.

² 107 U. S. at page 614.

donor to divest himself of the property.¹ That is the crucial test. If it is necessary to call upon the donor to do anything the gift fails, because the law never will compel him to complete an incomplete gift. There is always *locus penitentie*.

In the case of unindorsed notes, the gift is complete by delivery, because the delivery of the note carries with it the right to use the name of the donor in a suit to recover its contents.

In the case of stocks, the donor must have signed a transfer, or a power of attorney authorizing the donee to assign them. Ordinarily this is all which is legally necessary to transfer the title in stocks. But where the statute law or the corporation charter requires that a transfer shall be signed by the owner upon the books of the company, then such transfer must be signed by the donor, or by some one authorized by him in his lifetime.

216. AS TO SAVINGS BANK DEPOSITS. — These call for a brief special consideration. When a deposit is made in a savings bank it is entered in a small deposit or pass book, which is delivered to the depositor, and which constitutes his voucher; and the bank will make no payment except on presentation of this book. (Should the book be lost, upon due proof thereof and upon indemnity being furnished to the bank, payment must be made to the rightful owner.) This book, being in the nature of a voucher, usually plays an important part in all questions relating to deposits in savings banks. These points have been decided, namely: —

(1) A valid gift of funds in a savings bank may be made by delivery of the bank-book to the donee, with a merely oral assignment to him of the fund. Formal words are not necessary to constitute such an assignment. Any words showing that the depositor intended to make a present gift of the funds are sufficient.

It has long been settled that delivery of the book to the donee, with a written assignment of the fund, makes a good gift; but in *Pierce's Administrator v. Boston Five*

¹ [Jackson v. Twenty-Third St. Railway Co. 88 N. Y. 520.]

*Cent. Savings Bank*¹ it was for the first time held that such a gift is good without any written assignment. The court say: "We can have no doubt that a purchaser, to whom such a book is delivered without assignment, obtains an equitable title to the fund it represents; and a title by gift, when the claims of creditors do not affect its validity, stands on the same footing as a title by sale."² It was also held in that case that a good gift *causâ mortis* may be made to a donee in trust, and that the donee is bound by the trust.

217. (2) A mere deposit in bank by one in his own name as trustee for another does not operate as a gift of the fund, nor entitle the other to any claim thereto. In such a case there must be additional proof of a present intention to give, and some declaration of that intent beyond this form of deposit.³

In *Brabrook v. Boston Five Cents Savings Bank*,⁴ A had deposited money in a savings bank in his own name as trustee for C, C being his daughter. The money was his own. He retained the pass-book, and gave no notice to his daughter. The proof was that he made the deposit in this way because he already had on deposit in his own name as large a sum as the bank allowed. The court held that the deposit did not pass to the daughter. "There must be some act of delivery out of the possession of the donor for the purpose and with the intent that the title shall thereby pass."⁵

218. (3) Nor will the deposit of funds by the owner in the name of a third person operate of itself as a gift to such person. There must be proof beyond the fact of deposit that the deposit was intended as a gift, and that the donee had notice of and accepted the gift.⁶

¹ 129 Mass. 425.

² [Penfield v. Thayer, 2 E. D. Smith (N. Y.), 305; Camp's Appeal, 36 Conn. 88; Hill v. Stevenson, 63 Me. 364; Tillinghast v. Wheaton, 8 R. I. 536. See, also, Debinson v. Emmons, 158 Mass. 592; 2 Pomeroy's Eq. § 1148. *Contra*, Ashbrook v. Ryon, 2 Bush (Ky.), 228.]

³ [Marcy v. Amazeen, 61 N. H. 131; Parkman v. Suffolk Savings Bank, 151 Mass. 218. *Contra*, Martin v. Funk, 75 N. Y. 134; Minor v. Rogers, 40 Conn. 512.]

⁴ 104 Mass. 228.

⁵ [*Contra*, Mabie v. Bailey, 95 N. Y. 206.]

⁶ Scott v. Berkshire Savings Bank, 140 Mass. 157. [For recent

219. (4) On the other hand, where one deposits funds as trustee for another, and informs the *cestui que trust* that the deposit is a gift to him, this constitutes a sufficient declaration of trust, although the depositor retains the pass-book and receives the interest on the deposit during his life.¹

In *Gerrish v. New Bedford Institution for Savings*² the depositor made three deposits in his name as trustee for A, B, and C, his son and grandchildren. He retained the books and received the interest on the deposits during his life. But the proof was, that the depositor told his son and grandchildren at different times "that he had put this money in the bank for them, that he wanted to draw the interest during his lifetime, and that after he was gone they were to have the money." It was held by a majority of the court that this was a sufficient declaration of trust in behalf of the claimants. *Eastman v. Woronoco Savings Bank*³ is in the same direction. But *Nutt v. Morse*⁴ seems to be in direct conflict with *Gerrish v. New Bedford Institution for Savings*, except that in *Nutt v. Morse* the donor reserved control over the funds.⁵

In *Sherman v. New Bedford Five Cents Savings Bank*⁶ it was said: "A declaration of trust by the owner, or a deposit of the fund in his name as trustee, or a deposit in the name

cases on this subject similar to the case of *Scott v. Berkshire Co. Savings Bank*, where the court held that there was no trust, see *Beaver v. Beaver*, 117 N. Y. 421, 137 N. Y. 59; *Schick v. Grote*, 42 N. J. Eq. 352. For a case where the money was deposited in the name of the alleged donor and donee jointly, see *Taylor v. Henry*, 48 Md. 550. See, also, *Matter of Bolin*, 136 N. Y. 177, where the donee had possession of the book, and yet there was held to have been no gift. For cases where the court decided, under the circumstances, that there was an intention to make a gift, and that the transfer was complete, see *Howard v. Savings Bank*, 40 Vt. 597; *Blas-*

del v. Locke, 52 N. H. 238; *Gardner v. Merritt*, 32 Md. 78.]

¹ [*Ray v. Simmons*, 11 R. I. 266; *Barker v. Frye*, 75 Me. 29.]

² 128 Mass. 159.

³ 136 Mass. 208.

⁴ 142 Mass. 1.

⁵ [Extrinsic evidence is admissible to determine the intent of the donor; to arrive at the donor's intent being of course the object of the court. *Gerrish v. New Bedford Institution for Savings*, 128 Mass. 159; *Northrop v. Hale*, 72 Me. 275; *Hughes v. Stubbs*, 1 Hare, 479; *Taylor v. Henry*, 48 Md. 550; *Ray v. Simmons*, 11 R. I. 266.]

⁶ 138 Mass. 581.

of another will not of itself be sufficient to prove a gift or voluntary trust. There must be some further act or circumstance showing a perfected gift of the legal or equitable interest."

220. REVOCATION. — Another point remains to be stated, namely, that a voluntary settlement, although made, as the term imports, without consideration, is irrevocable, unless a power to revoke is reserved in the instrument of settlement or transfer.¹ And the mode of revocation provided for must strictly be pursued.² If it is to be done by a sealed instrument, then a revocation under seal is necessary; if by an attested instrument, then a witness is necessary. Upon this point the cases are unanimous.

In *Ellison v. Ellison*,³ a power was reserved to revoke by means of an instrument attested by two witnesses. The settlor attempted to revoke by an instrument attested by one witness only. Lord Eldon held that the revocation was void. *Kekewich v. Manning*⁴ was a hard case. A settlement was made by a woman, on the eve of her marriage, upon the issue of the marriage, and then to a niece. Her husband died without issue. She married again, and attempted to make another settlement, but it was held void as against the first settlement, no power to revoke having been reserved in the first settlement.

In *Paul v. Paul*,⁵ on appeal, the court said, "This has been the rule ever since the court of chancery existed." To the same effect are *Viney v. Abbott*,⁶ *Sewall v. Roberts*,⁷ and the cases there cited.

221. The omission of a power of revocation in a purely voluntary settlement is always a circumstance to be considered in determining whether or not it was fairly and intel-

¹ [Keyes v. Carleton, 141 Mass. C.) 93; Henson v. Kinard, 3 Strob. 45; Sargent v. Baldwin, 60 Vt. 17; Eq. (S. C.) 371.]

² [Van Cott v. Prentice, 104 N. Y. 45.]

³ 6 Ves. 656.

⁴ 1 De G., M. & G. 176.

⁵ L. R. 20 Ch. D. 742.

⁶ 109 Mass. 300.

⁷ 115 Mass. 262.

¹ Dawson v. Dawson, 1 Dev. Eq. (N.

ligently made.¹ If it was made with full knowledge and understanding of its effect, the deed is binding. But it has been held that if the circumstances are such that the donor ought to be advised to retain a power of revocation, the want of such advice will in general be fatal to the deed ; as in the case of a young or improvident person, or of a woman divesting herself of the control of her property for the benefit of some one who may be supposed to have undue influence over her.²

But this presumption will not attach where a power of revocation would defeat the whole purpose of the settlement,³ as where a young man about to engage in a hazardous business makes a proper settlement in behalf of his wife and children. Such was *Henry v. Armstrong*,⁴ where the settlor endeavored to have the instrument cancelled on the ground that he had been pressed to make it by his father-in-law.

¹ [Everitt v. Everitt, L. R. 10 Eq. 405 ; Russell's Appeal, 75 Pa. St. 269, 278 ; Huguenin v. Baseley, 14 Ves. 273 ; Garnsey v. Mundy, 24 N. J. Eq. 243.] ² Coutts v. Acworth, L. R. 8 Eq. 558, and cases there cited.
³ [Reidy v. Small, 154 Pa. St. 505.]
⁴ L. R. 18 Ch. D. 668.

CHAPTER X.

RESULTING TRUSTS.

222. WE are now to consider Implied Trusts, that is, trusts created by law. These, again, are divided into Resulting Trusts and Constructive Trusts.

The term "resulting trust" is applied to a class of trusts which the law creates from the presumed intention of the parties. Where parties do certain acts, or are found in certain relations to each other, the law presumes from those acts or relations that one party intends to hold the property in question in trust for the other, and so, as it is said, a trust results from those acts or relations. The basis, then, of this class of trusts is, that the law makes an inference from certain acts or relations. It imputes to a party an intention, under certain circumstances, or in consequence of certain conduct, and it gives effect to that presumed intention by clothing it with the force of a duty or trust to be performed.

223. Constructive trusts are those which, independently of the intention of the parties, the law creates under certain circumstances, in order to prevent the fraud or injustice which would otherwise ensue. These trusts are not based upon the presumed intention of the party. On the contrary, they exist contrary to that intention, and in a great many cases for the very purpose of defeating that intention. As has been well said, they are trusts which are forced upon the conscience of the party by operation of law.

224. The distinction between resulting and constructive trusts is not one which can be adhered to with scientific accuracy. Indeed, many cases ordinarily classified as resulting trusts might with almost equal propriety be treated as constructive trusts, because the presumption of intention in these cases is a forced presumption, — contrary to the actual fact, — and is imputed to the party only to prevent an intended

fraud. Nor is the distinction of much practical importance. Whether called "resulting" or "constructive" trusts, they are governed by the same rules, and they are alike implied by law, in contradistinction from being created by the parties. It will be convenient, however, in discussing the subject, to follow the usual classification, and I shall treat, first, of

Resulting Trusts.

225. The first instance of a resulting trust is where one person pays the consideration for a conveyance but the title is taken in the name of another. Here a resulting trust immediately arises from the transaction, and the person who holds the legal title holds it as trustee for the person who actually paid the consideration.¹

The theory of this rule is as follows: In the absence of all controlling circumstances, a presumption² arises that, where one furnishes the consideration for a purchase, he intends it for his own benefit, and that, if the legal title is taken in the name of another, this is done to accomplish some temporary convenience, and not to deprive the party paying the money of his beneficial interest in the estate. This rule is so generally and firmly established that it is unnecessary to dwell upon particular cases.³

226. It is important to observe, first, that this trust must arise, if at all, at the very time of, and out of, the transaction itself, — that is, the purchase. The funds must then be advanced and the purchase made by means of that advance.⁴ In *Olcut v. Bynum*⁵ the court said: "Such a trust must

¹ [*Dyer v. Dyer*, 2 Cox, 92; *Hill v. Pollard*, 132 Ind. 588. So where several persons buy land and take the title in the name of one only, a trust for them all results. *Ross v. Hegeman*, 2 Edw. Ch. 373; *Powell v. Monson Co.* 3 Mason, 347. This principle applies to personal as well as to real property: *James v. Holmes*, 4 De G., F. & J. 470.]

² [This being a mere presumption, it may always be rebutted by evidence of a gift. *Edwards v. Ed-*

wards, 39 Pa. St. 369; *Jackson v. Feller*, 2 Wend. 465.]

³ See *Dwinel v. Veazie*, 36 Me. 509; and the cases collected in 1 *Perry on Trusts*, § 126.

⁴ [*Buck v. Pike*, 11 Me. 9; *Gerry v. Stimson*, 60 Me. 186; *Perry v. M'Henry*, 13 Ill. 227; *Finnoch v. Clough*, 16 Vt. 500; *Niver v. Crane*, 98 N. Y. 40; *Nixon's Appeal*, 63 Pa. St. 279; *Miller v. Blose*, 30 Gratt. 744.]

⁵ 17 Wall. 44.

arise, if at all, at the time the purchase is made. The funds must then be advanced and invested. It cannot be created by after advances or funds subsequently furnished."¹

As Chancellor Kent said, "the whole foundation of the trust is the payment of the money, and that must be clearly proved."² It follows, therefore, that no trust arises from any subsequent loan of funds to pay for a purchase already made, although the loan is in consideration of and accompanied by an oral promise to hold the estate in trust for the lender. This trust is not implied to protect a lender, *i. e.* a creditor, but to give a party the benefit of his own purchase made with his own funds, although the title is taken by another.

227. Nor will it arise from a mere oral agreement by one that he will purchase with his own funds, and then hold the estate for another³ (provided that no fiduciary relation exists between them).⁴

228. So, also, where two or more have agreed to make the purchase, and one subsequently makes it with his own funds in his own name, behind the backs of the others, no trust results. The transaction may be very dishonorable, but the law cannot reach it.⁵

229. Where two or more have furnished the money, and the title is taken in the name of one, no trust results in behalf of the others, unless it appears that they advanced their money for some definite and specific interest in the estate purchased, as for one half or one quarter, or other fraction, or for a definite term, as for life or a number of years. The payment must be shown to have been for some "aliquot part" of the estate, or it will be regarded simply as a loan, and no trust will arise.⁶

¹ See, also, *Buck v. Swazey*, 35 Me. 41.

² *Botsford v. Burr*, 2 Johns. Ch. 405, 409; [*Blodgett v. Hildreth*, 103 Mass. 484. The evidence to establish the trust must be full and clear: *Bright v. Knight*, 35 W. Va. 40.]

³ [*Lamas v. Bayly*, 2 Vernon, 627; *Pinnock v. Clough*, 16 Vt. 500;

Rogers v. Simmons, 55 Ill. 76; *Botsford v. Burr*, 2 Johns. Ch. 405; *Kimmel v. Smith*, 117 Pa. St. 183.]

⁴ *Kendall v. Mann*, 11 Allen, 15; *Barnard v. Jewett*, 97 Mass. 87.

⁵ [*Clarke v. McAuliffe*, 81 Wis. 104.]

⁶ *Olcut v. Bynum*, 17 Wall. 44; *McGowan v. McGowan*, 14 Gray, 119; *Snow v. Paine*, 114 Mass. 520;

230. If one having agreed to make a purchase for another, and to advance the purchase-money as a loan, takes the conveyance in his own name, a trust results, and he holds the estate in trust for the other.¹ This also is well settled. Here the person paying the consideration and taking the title has paid it, not for himself but for the other. The other is his debtor for the money. It is the same, therefore, as if the debtor had borrowed the money of any one else.²

But this doctrine is somewhat dangerous, and therefore courts ought to require very clear and satisfactory proof of such an agreement. Otherwise any one who had made a good purchase with his own funds might be surprised by the contention that he had made it in behalf of some one else.

231. The advance need not be in money, but if the property of another, in whatever form, is accepted in payment of the consideration, the trust arises.³ It may arise from an exchange of estates.

In *Friedlander v. Johnson*⁴ Mr. Justice Bradley said: "As to the position that a resulting trust only arises when actual money of another is used in the purchase of property, and not when other assets are so used, it has no foundation in reason or authority."

In this case a husband had taken to himself the title of an estate received in exchange for a plantation and slaves belonging to his wife.

Baker v. Vining, 30 Me. 121; [*Bailey v. Hemenway*, 147 Mass. 326; *Sayres v. Townsend*, 15 Wend. 647; *Reynolds v. Morris*, 17 Ohio St. 510; *Cutler v. Tuttle*, 19 N. J. Eq. 549, 561; *White v. Carpenter*, 2 Paige, 217, 239; *Reed v. Reed*, 135 Ill. 482. In the following cases it was held that a trust arose: *Hall v. Young*, 37 N. H. 134; *Bowen v. McKean*, 82 Mo. 594; *Union College v. Wheeler*, 5 Lans. (N. Y.) 160; *Anthe v. Heide*, 85 Ala. 236.]

¹ [*Millard v. Hathaway*, 27 Cal.

119; *Bates v. Kelly*, 80 Ala. 142; *Reeve v. Strawn*, 14 Ill. 94; *Lounsbury v. Purdy*, 16 Barb. 376; *Harvey v. Pennypacker*, 4 Del. Ch. 445.]

² *McDonough v. O'Niel*, 113 Mass. 92; *Jackson v. Stevens*, 108 Mass. 94; *Kendall v. Mann*, 11 Allen, 15; *Boyd v. McLean*, 1 Johns. Ch. 582.

³ [*Dwinel v. Veazie*, 36 Me. 509; *Thomas v. Thomas*, 62 Miss. 531; *Seiler v. Mohn*, 37 W. Va. 507.]

⁴ 2 Wood, 675.

232. Where a conveyance or transfer is made to the person paying the consideration, and also to a third person, the presumption is that the latter takes only as trustee for the former, and a trust results in his favor.¹ But this presumption may be rebutted by showing that a gift was intended.² This is the rule as to personal estate; how far it applies to real estate, under the modern deed which reads "to the use" of grantees, thus stating a trust in the deed itself, is doubtful.

233. There are some modifications of the rule respecting resulting trusts, arising chiefly out of the relations of husband and wife, parent and child. Where a conveyance is made to husband and wife jointly, the husband paying the consideration, the presumption is that this was intended as a gift or provision for the wife in case she survives him; and no trust results.³

234. So, also, if the transfer is made to the wife alone, the presumption is that it was intended as a provision for the wife, and no trust will result, "in the absence of clear proof to the contrary."⁴

235. So, also, where the transfer is made to husband and wife and a stranger, the presumption is that this was intended as a provision for the wife in case she survives the husband, and that the title of the stranger is only that of trustee by way of resulting trust in favor of the husband and wife and the survivor of them.⁵

236. The same rule holds good in the case of a transfer

¹ *Standing v. Bowring*, L. R. 31 Ch. D. 282; *Fowkes v. Pascoe*, L. R. 10 Ch. App. 343; [*Dyer v. Dyer*, 2 Cox, 92.]

² See the cases stated above.

³ *Dummer v. Pitcher*, 2 M. & K. 262; *Eykyn's Trusts*, L. R. 6 Ch. D. 115.

⁴ *Cormerais v. Wesselhoeft*, 114 Mass. 550; *Edgerly v. Edgerly*, 112 Mass. 175; [*Whitten v. Whitten*, 3 Cush. 191; *Dickinson v. Davis*, 43 N. H. 647; *Wheeler v. Kirtland*, 23 N. J. Eq. 13; *Groff v. Rohrer*, 35

Md. 327; *Bent v. Bent*, 44 Vt. 555; *Johnston v. Johnston*, 138 Ill. 385. In *Soar v. Foster*, 4 Kay & J. 152, where the marriage was void, it was held that a trust resulted for the supposed husband, he having purchased property and taken title to it in the name of his supposed wife. See, also, *Marshall v. Crutwell*, L. R. 20 Eq. 328.]

⁵ *Eykyn's Trusts*, L. R. 6 Ch. D. 115; [*Kingdon v. Bridges*, 2 Vernon, 67.]

to a father and child,¹ or to a child alone,² where the parent pays the consideration.³ It is presumed to be a provision or gift to the child, and no trust results in favor of the parent.⁴

Where a transfer was made to a woman in the name of herself, a married daughter, and the latter's husband, the presumption of gift was extended, under the circumstances, to the son-in-law, although the daughter died before the mother.⁵

237. But this presumption in favor of a gift may be rebutted by proof that no gift was intended, in which case the person in whose name the title is taken will hold the title, by resulting trust, for the purchaser.⁶ In *Stock v. McAvoy*⁷

¹ [Thompson v. Thompson, 1 Yerg. 97. So, where the money is paid by a father, and title is taken in the name of his son and a stranger, a trust in one half only results to the father: *Lamplugh v. Lamplugh*, 1 P. Wms. 111.]

² [Roberts v. Coleman, 37 W. Va. 143; *Page v. Page*, 8 N. H. 187.]

³ [It was held in *In re De Visme*, 2 De G., J. & S. 17 (no opinion being rendered), that where a mother took title in the name of her son, a trust resulted in her favor. To the same effect is *Bennet v. Bennet*, L. R. 10 Ch. D. 474, where Jessel, M. R., said that there is no "moral legal [sic] obligation" upon a mother to provide for her child. There is, however, an implication to the contrary in *Garrett v. Wilkinson*, 2 De G. & Sm. 244.]

⁴ *Dummer v. Pitcher*, 2 M. & K. 272, *supra*; *Perry on Trusts*, § 145; [*Shaw v. Read*, 47 Pa. St. 96; *Sidmouth v. Sidmouth*, 2 Beav. 447. So, where title was taken in the name of a son-in-law, it was held to be an advancement, and no

trust resulted: *Thompson v. Thompson*, 18 Ohio St. 73; *Baker v. Leathers*, 3 Ind. 558. So where the grantee was an adopted daughter: *Astreen v. Flanagan*, 3 Edw. Ch. 279. So, also, where a son takes title in his mother's name, no trust results: *Todd v. Moorhouse*, L. R. 19 Eq. 69. The same principle was applied under peculiar circumstances in favor of a nephew of the donor's wife: *Currant v. Jago*, 1 Coll. 261. So where the grantee was an illegitimate child of the donor; *Soar v. Foster*, 4 Kay & J. 152, 160. Not so where the grantee was the illegitimate child of the alleged donor's daughter: *Tucker v. Burrow*, 2 H. & M. 515. The rule embraces all persons for whom the purchaser is under any legal or moral obligation to provide.]

⁵ *Batstone v. Salter*, L. R. 10 Ch. App. 431.

⁶ [*Dana v. Dana*, 154 Mass. 491; *Valle v. Bryan*, 19 Mo. 423; *Guthrie v. Gardener*, 19 Wend. 414; *Read v. Huff*, 40 N. J. Eq. 229. That the son was also solicitor for

⁷ L. R. 15 Eq. Cas. 55.

the father took possession of the estate, and leased and controlled it during his life, receiving the rents. It was held that his son held the title in trust and not as a gift.¹

238. Where the wife furnishes the consideration and the title is taken by the husband, a trust will result in her favor, except upon clear proof that the conveyance to the husband was made with her consent, and was intended by her as a gift to him.²

239. FIDUCIARY FUNDS. — The rule establishing a trust, whenever the purchase-money is furnished by one and the title is taken by another, applies all the more strictly to cases where the person taking the title stands in a fiduciary relation toward the one whose funds are used in the purchase. If a trustee purchases an estate with the trust funds, taking the title to himself individually, or if an agent uses the funds of his principal, or a partner the funds of the partnership, — in all of these cases the purchaser will be held to be but a trustee of the legal title for the *cestui que trust*, the principal, or the partnership, as the case may be.³

In these cases, it is to be observed, the funds applied in the purchase are those of the principal seeking to enforce the trust.

240. But suppose an agent who is employed by a principal to purchase an estate, and who agrees to act in that capacity,

the parent was held to rebut the presumption that a gift to him was intended: *Garrett v. Wilkinson*, 2 De G. & Sm. 244. So, in *Wallace v. Bowen*, 28 Vt. 638, the property having been taken in the wife's name merely as a joke, the court decreed a trust. In *Maxwell v. Maxwell*, 109 Ill. 588, it was held that the circumstances were not strong enough to rebut the presumption of a gift. See, further, *Christy v. Courtenay*, 13 Beav. 96; *Sidmouth v. Sidmouth*, 2 Beav. 447.]

¹ [But the relationship of a brother is not sufficient to raise the presumption of a gift to him when the

title is taken in his name: *Edwards v. Edwards*, 39 Pa. St. 369.]

² *Nicklin v. Wythe*, 2 Sawyer, 535; *Friedlander v. Johnson*, 2 Wood, 675; [*McGovern v. Knox*, 21 Ohio St. 547.]

³ [Purchase by trustees: *Moffitt v. McDonald*, 11 Humph. 457; *Weaver v. Fisher*, 110 Ill. 146. By a guardian: *Rice v. Rice*, 108 Ill. 199; *Dorr v. Davis*, 76 Me. 301. By an administrator: *Merket v. Smith*, 33 Kans. 66. By a partner: *Richards v. Manson*, 101 Mass. 482; *Traphagen v. Burt*, 67 N. Y. 30. See, also, *infra*, p. 155.]

the principal to furnish the funds, secures the estate for himself, and pays the purchase-money out of his own funds. What is the rule? I state it thus: If an agent employed to purchase an estate for his principal purchases it for himself, he becomes a trustee for his principal, although the agency and trust are proved only by parol.

There are two sides to this question. Sugden¹ states the rule as follows: "Where a man merely employs another person by parol as an agent to buy an estate, who buys it for himself and denies the trust, and no part of the purchase-money is paid by the principal, and there is no written agreement, he cannot compel the agent to convey the estate to him, as that would be directly in the teeth of the statute of frauds." This statement is cited with approval in *Kendall v. Mann*,² although the point involved was not before the court.

I think that the weight of authority and reason is the other way. From the very first, it has been held that the statute of frauds should not be used as a help to perpetrate fraud, and that cases of fraud are not covered by the statute. As was succinctly said by Lord Justice Turner in *Lincoln v. Wright*,³ "the principle of the court [of equity] is, that the statute of frauds was not made to cover fraud."

Now there can be no grosser fraud in fact than for an agent, who is employed to secure a particular estate for his principal, to betray his trust and secure the estate for himself. It does not help the transaction that, by thus making himself the purchaser, he has rendered it impossible for his principal to pay the purchase-money. Having obtained the title by this fraud, equity imposes upon him the trust to hold the legal title as trustee for his principal. The statute of frauds presents no difficulty because, by its express terms, trusts arising or resulting by implication of law are excluded from its operation, and in the case supposed equity creates a trust out of the fraud of the agent.⁴

¹ Sugden on Vendors, 15th Amer. ed. p. 703.

² 11 Allen, 15.

³ 4 De Gex & J. 16, 22.

⁴ [The position taken in the text is certainly in harmony with the logic and justice of the case, but it is in conflict with numerous deci-

241. In England the following cases are direct authorities upon this point: *Lees v. Nuttall*,¹ *Taylor v. Salmon*.²

sions. If the contract relied upon were a contract on the part of the defendant to procure a conveyance to himself, and thereafter to convey to the plaintiff, that no doubt would be within the statute. In such a case the defendant would have executed part of the contract by taking the conveyance to himself, and it would remain for him to carry out his promise to convey to the plaintiff; the suit against him, therefore, would have to be on a contract to convey land, and such a contract must be in writing, or else it is void under the statute of frauds: *Howland v. Blake*, 97 U. S. 624; *Botsford v. Burr*, 2 Johns. Ch. 405; *Watson v. Erb*, 33 Ohio St. 35.

But more commonly the contract on the part of the defendant is to procure a deed to be made to the plaintiff, or to procure for the plaintiff an agreement to convey by the owner of the land. In other words, the contract is one of agency to purchase, or to negotiate for the purchase of, land, and there is no provision in the statute against the creation by verbal agreement of such an agency, or against the proof of it by parol evidence. Section four of the statute cannot apply to this case, because the plaintiff is not endeavoring to enforce "any contract for the sale of lands," etc., but merely to show a contract making the defendant his agent to negotiate for the purchase of lands, and such an agency, according to the authorities just cited, may be created and

proved by parol. This relation being once shown, the duty arises on the part of the defendant to purchase for the plaintiff, and a purchase in his, the agent's name would be a breach of that duty constituting him a constructive trustee for the benefit of his principal.

The more strict doctrine that a trust will not result in the case last stated rests chiefly on two authorities, — first, the case of *Bartlett v. Pickergill* (1 Eden, 515); and secondly, a passage in *Sugden on Vendors and Purchasers* (vol. ii. ch. xxi. § 1, 8th Amer. ed.). The facts in *Bartlett v. Pickergill* are meagrely reported, but the case seems to be one of the first class above stated, that is, one where the agreement of the defendant was to procure a conveyance to himself and then to convey to the plaintiff. If this be so, the case is not an authority for the proposition often based upon it, namely, that if an agent be authorized orally to purchase land for another and then takes the title in his own name in breach of his duty, no trust will result to his principal by operation of law. As to the passage in *Sugden*, that certainly contemplates cases of the first class stated above, for in that passage it is expressly said that the principal "cannot compel the agent to convey the estate to him." It would seem, therefore, on authority as well as on principle, that the doctrine which does not permit a trust of this kind to be proved by

¹ 1 Russ. & M. 53; s. c. on appeal, 2 M & K. 819.

² 4 M. & Cr. 134.

In 2 Story's Equity, § 1201 *a*, the doctrine is stated as it is in Sugden, but in § 1211 *a* the reverse is stated, namely, "If an agent, who is employed to purchase for another, purchases in his own name, or for his own account, he will be held to be a trustee of the principal at the option of the other," and the author cites *Lees v. Nuttall*, *supra*. Judge Story applied the doctrine of this quotation in *Jenkins v. Eldridge* (3 Story's Rep. p. 290), where both the agency and the trust were created by parol.¹

In New York² Chancellor Walworth said: "It is a settled principle of equity that, where a person undertakes to act as an agent for another, he cannot be permitted to deal in the matter of that agency upon his own account and for his own benefit. And if he takes a conveyance in his own name of an estate which he undertakes to obtain for another, he will in equity be considered as holding it in trust for his principal." To the same effect is *Parkist v. Alexander*.³

In *Pinnock v. Clough*⁴ it is admitted that, if an agent employed to take title in his principal's name fraudulently purchases for himself, he becomes a trustee, and the statute of frauds affords no defence. In *Brown v. Dwelley*⁵ the principal furnished the money which the agent used in purchasing the estate, and it was held that a trust resulted.

242. FIDUCIARY RELATION. — The second instance of a resulting trust is the acquisition of property by one standing in a fiduciary relation to another. It is well settled that where parties stand in a fiduciary relation to one another, or have a community of interest in reference to particular prop-

parol evidence has no good foundation. It is, however, adopted in these cases: *Gibson v. Foote*, 40 Miss. 788; *Burden v. Sheridan*, 36 Iowa, 125. See, also, *Emerson v. Galloupe*, 158 Mass. 146; *James v. Smith* [1891], 1 Ch. 384. *Contra*, *Heard v. Pilley*, L. R. 4 Ch. App. 548; *Chattock v. Muller*, L. R. 8 Ch. D. 177; *Lees v. Nuttall*, 1 Russ. & M. 53, *supra*; *Sugden on Vendors and Purchasers*, p. 145; *Chastian v. Smith*, 30 Ga. 96; *Rose v.*

Hayden, 35 Kans. 106; *Strong v. Glasgow*, 2 Murphy (N. C.), 289; *Browne on the Statute of Frauds*, § 96.]

¹ See, also, *Von Hurter v. Spengeman*, 17 N. J. Eq. 185; *Manning v. Hayden*, 5 Sawyer, 360.

² *Sweet v. Jacocks*, 6 Paige, 355, 364.

³ 1 Johns. Ch. 394.

⁴ 16 Vt. 500.

⁵ 45 Me. 52.

erty, one cannot obtain an outstanding title exclusively for his own benefit, but he will be made to hold it as trustee for the others.¹

243. This rule is especially applicable to copartners, tenants in common, and to persons holding a fiduciary position, as agents, attorneys, and trustees. Thus, where one partner had secretly, for his own benefit, obtained a renewal of a lease of the premises occupied by the partnership, Sir William Grant decided that the lease was a trust for the benefit of the partnership.² He said: "It is clear that one partner cannot treat privately and behind the backs of his copartners for a lease of the premises, where the joint trade is carried on, for his individual benefit. If he does so treat and obtains a lease in his own name, it is a trust for the partnership." Judge Story cites this case with approbation in *Flagg v. Mann*,³ and says: "There is nothing new in this doctrine, for the same point was decided a century before."

So, also, where a partnership had been agreed upon to purchase and work a certain mine, and one of the prospective partners undertook to obtain the property for the prospective partnership, and he made an agreement by which the property was to be sold to the partnership at one price, but he was to have in addition a gift of £12,000, it was held that he was a trustee of this sum for his copartners.⁴

244. In *Van Horne v. Fonda*⁵ Chancellor Kent applied the same rule to two devisees in possession under an imperfect title. The outstanding title bought by one was held to inure for the benefit of both.

In *Rothwell v. Dewees*,⁶ the United States Supreme

¹ [The case of a director, *Blake v. Buffalo Creek R. R. Co.* 56 N. Y. 485; of a guardian, *Keech v. Sanford*, Select Cases in Chancery, 61; of a trustee, *Green v. Winter*, 1 Johns. Ch. 26, 36; *King v. Cushman*, 41 Ill. 31; of an attorney and client, *Edwards v. Gottschalk*, 25 Mo. App. 549; of a confidential clerk, *Davis v. Hamlin*, 108 Ill. 39. For a case where the relation was

held to have terminated, so that the attorney was at liberty to purchase for himself, see *Rogers v. Gaston*, 43 Minn. 189.]

² *Featherstonhaugh v. Fenwick*, 17 Ves. 298, 311.

³ 2 Sumner, 486, 521.

⁴ *Fawcett v. Whitehouse*, 1 Russ & M. 132.

⁵ 5 Johns. Ch. 388.

⁶ 2 Black, 613.

Court held that the same rule is applicable to tenants in common.

A case of joint lessees is *Burrell v. Bull*.¹

In all of these cases a resulting trust arises, because, it is said, the law imputes to the purchaser an intention to purchase for the benefit of his associates; and for this reason, that it would be unfair and fraudulent toward them for him to do otherwise.

245. If an agent acquires knowledge of a defect in the title of his principal and buys in the hostile claim, he holds it as trustee for his principal.²

So of an attorney. "An attorney can in no case, without the client's consent, buy and hold otherwise than in trust any adverse title or interest touching the thing to which his employment relates."³

246. These cases illustrate what I have said already as to the difficulty of preserving a scientific distinction between resulting and constructive trusts; because, in all trusts founded upon fiduciary relations, the trust is forced upon the conscience of the party, contrary to his real intention, quite as much as in the plainest case of fraud. The partner meant to get the lease for his own benefit, and so of the joint devisee, the cotenant, and the rest.

247. UNEXHAUSTED TRUST ESTATE FUNDS.—The third class of resulting trusts is found in those cases where property given in trust has not for any reason been exhausted by the trust. In all such cases the trustee holds the residue by a resulting trust for the benefit of the grantor, or of his heirs or devisees, as the case may be.⁴ It is a fundamental rule that, where property has been conveyed strictly in trust, the trustee takes no beneficial interest in the property. If the trusts entirely fail for any reason, or if they do not exhaust the property, the trustee takes nothing thereby, but the property or its residue reverts to the original grantor, or to those who succeed to his rights.⁵

¹ 3 Sandf. Ch. 15.

⁴ [2 Pomeroy's Eq. § 1032.]

² *Ringo v. Binns*, 10 Peters, 269.

⁵ *Nichols v. Allen*, 130 Mass

³ *Baker v. Humphrey*, 101 U. S. 211.

494, 501.

248. This failure may arise from several causes, namely :—

(1) A grant or devise may be made upon trust, but by some accident or omission no trusts whatever may be specified in the instrument. In this case the trustee does not hold the property, but it reverts to the grantor, or to his heirs or devisees.¹

(2) Trusts may have been specified, but they may be held void in law, as for remoteness,² uncertainty,³ or (in Massachusetts, for instance) because they were orally communicated, or for any other reason. The same result follows. The property reverts by resulting trust to the estate of the testator.⁴

(3) A third instance is where the trusts are properly defined, but after fulfilling them a balance of the property remains.⁵ For example, a testator devises an estate upon the trust to pay from the income thereof the sum of \$1,000 annually to A during his life, but making no other disposition of the income, or of the body of the estate. The estate, we will suppose, gives an annual income of \$2,000. The other \$1,000 of income will belong to the testator's next of kin or legatees, by way of resulting trust; and, upon the death of A, the principal—that is, the estate itself—will pass to them in like manner.

249. Another instance of a trust which results because the purposes of the original trust have not exhausted the estate is where a man conveys or devises his property to trustees for the payment of his debts. If the debts do not exhaust the estate, then the trustees hold the balance

¹ [Dunnage v. White, 1 J. & W. 583; Goodere v. Lloyd, 3 Sim. 538; Dillaye v. Greenough, 45 N. Y. 438.]

² [Halford v. Stains, 16 Sim. 488.]

³ [Heiskell v. Trout, 31 W. Va. 810; Rizer v. Perry, 58 Md. 112.]

⁴ [James v. Allen, 3 Mer. 17; Kendall v. Granger, 5 Beav. 300.]

⁵ [In re Sanderson's Trust, 3 K. & J. 497; Cooke v. Smith, L. R.

45 Ch. D. 38; Bond v. Moore, 90 N. C. 239; McElroy v. McElroy, 113 Mass. 509; Harker v. Reilly, 4 Del. Ch. 72. So where the trust was for a church, which was subsequently given up: Gumbert's Appeal, 110 Pa. St. 496; Estabrooks v. Tillinghast, 5 Gray, 17. So where a cemetery was abandoned: Schlessinger v. Mallard, 70 Cal. 326.]

by a resulting trust for his benefit, or that of his representatives.¹

250. In this connection, however, an important distinction is to be observed, especially in the case of wills. A testator may make a devise strictly in trust for the payment of debts or legacies; or he may make a gift, charging the devisee at the same time with the duty of paying certain debts or legacies. Thus he may devise an estate to A, for the express purpose that A, out of the proceeds, shall pay certain debts or legacies; or he may give the estate outright to A, but at the same time charge him, as an incumbrance on the estate, with the duty of paying certain debts or legacies. In this latter case the devisee is the ultimate object of the testator's bounty, and he is to have the beneficial use and enjoyment of the estate after discharging the obligations which the testator has imposed as incumbrances upon it.²

251. The distinction, as will be perceived, is an important one.³ Of course it is a question of construction in every case, as it arises, whether the devise was one strictly in trust merely for the purpose of paying debts, or an absolute gift to the devisee, but charged with the duty of paying the incumbrances which the testator has placed upon it.⁴

Where the devise is to a child, or to one who is naturally supposed to be an object of the testator's bounty, the presumption arises that the devise was intended as a gift and not simply as a trust.⁵ For a review of the cases, see *Irvine v. Sullivan*.⁶

252. RESULTING TRUSTS BY VOLUNTARY CONVEYANCES.
— It was formerly said that where a person made a convey-

¹ [Saltmarsh v. Barrett, 29 Beav. 474; Read v. Steadman, 26 Beav. 495; Barrs v. Fewkes, 2 Hem. & M. 60.]

² [Wood v. Cox, 2 Myl. & Cr. 684; Dawson v. Clarke, 18 Ves. 247; Downer v. Church, 44 N. Y. 647.]

³ [For a discussion of the subject, see 2 Pomeroy's Eq. § 1033.]

⁴ [King v. Dennison, 1 V. & B.

260; Blinkhorn v. Feast, 2 Ves. Sen. 27.]

⁵ [Rogers v. Rogers, 3 P. Wms. 193; Smith v. King, 16 East, 283. It is now settled in the United States that executors are trustees of any such residue, unless it is plainly given to them beneficially. See Perry on Trusts, § 155.]

⁶ L. R. 8 Eq. 673.

ance of real estate to a stranger in blood without consideration, the presumption was that it was not a gift, and the grantee held the title by resulting trust for the benefit of the grantor. This rule does not apply to modern conveyances, and no trust now results to a grantor simply because he conveys an estate without consideration.¹

253. If the conveyance was made to a relative, and therefore presumably from motives of affection, the rule was that a gift was intended and that no trust resulted. But the same rule is now established as to all voluntary conveyances, *i. e.* conveyances where no consideration is paid. In other words, no trust is implied by law under these circumstances. In modern conveyances, as a rule, the deed itself declares that the estate conveyed is to be held by the grantee to "his own use and behoof forever." The use or trust upon which the estate is conveyed is thus expressly stated in the deed itself. Now, as the deed itself declares the trust upon which it is made, no trust other than that stated in the deed can be established by parol evidence, because such evidence would contradict the deed, which says that the grantee is to hold the estate for his own use, and would also be directly in the teeth of the statute of frauds.² Consequently it follows that, as the law implies no trust in favor of the grantor in a voluntary deed, no such trust can be shown by parol evidence to the effect that the grantee verbally agreed to hold the estate for the benefit of the grantor.

This was the precise point settled in the case of *Titcomb v. Morrill*.³ In a recent case there was a conveyance without consideration by a son to his father for the purpose of cheating the son's creditors. It was held that no trust arose which could be enforced against the father or his heirs for the benefit of the son.⁴

The case of a voluntary deed is not to be confounded with the first case of a resulting trust mentioned above, where

¹ 1 Perry on Trusts, § 162, and 229; Bobb v. Bobb, 89 Mo. 411; cases cited; Gove v. Learoyd, 140 Philbrook v. Delano, 29 Me. 410.]
Mass. 524.

² [Graves v. Graves, 29 N. H. lett v. Bartlett, 14 Gray, 277.
129; Moore v. Jordan, 65 Miss. ⁴ Twomey v. Crowley, 137 Mass.
184.

one furnishes the consideration and the title is taken in the name of another.

254. **RESULTING TRUST UNDER A WILL.** — Whenever a testator makes a gift (of real or personal property) upon the oral promise of the donee that he will apply the gift in a certain way, a trust thereby results which equity will enforce.¹

Thus, if a testator is induced to give his whole estate to one son upon his oral promise that he will pay certain portions or amounts to his brothers and sisters, a trust thereby results in their favor, and equity will compel him to perform his promise. This is only one illustration. The rule is very broad. Whenever a testator has been induced to make any disposition of his estate, or of any part of it, upon the promise of the taker that he will apply it in a certain way, a trust is thereby created which equity will enforce. Lord Cairns thus stated the rule in *Jones v. Badley*:² “When a person, knowing that a testator, in making a disposition in his favor, intends it to be applied for purposes other than for his own benefit, either expressly promises or by silence implies³ that he will carry the testator’s intention into effect, and the property is left to him upon the faith of that promise or undertaking, it is in effect a case of trust.”⁴ In *Oliffe v. Wells*⁵ other cases are cited, and the court imply their concurrence in the doctrine.

255. The same rule obtains where the heir at law dissuades his ancestor from making any will, or from making a particular devise, upon his promise that he will apply the estate in accordance with the ancestor’s intentions.⁶

¹ [Hooker v. Axford, 33 Mich. 453; Carver v. Todd, 48 N. J. Eq. 102. See note, *supra*, p. 103.]

² L. R. 3 Ch. App. 362.

³ [Acquiescence may be implied by the mere silence of the donee. *In re O'Hara*, 95 N. Y. 403.]

⁴ *Podmore v. Gunning*, 7 Sim. 644.

⁵ 130 Mass. 221.

⁶ 1 Perry on Trusts, § 181; *McCormick v. Grogan*, L. R. 4 H. L. 82; *Norris v. Frazer*, L. R. 15 Eq. 318; [Dutton v. Poole, 2 Lev. 210; *Gilpatrick v. Glidden*, 81 Me. 137; *Williams v. Fitch*, 18 N. Y. 546. See, also, *Bulkley v. Wilford*, 2 Cl. & Fin. 177; s. c. 8 Bligh, 111. Of course, if there is no such promise accompanying the gift, parol evidence is not admissible to show the donor’s intention to create a trust, and the donee will take absolutely. *Wallgrave v. Tebbs*, 2 Kay & J. 313.]

CHAPTER XI.

CONSTRUCTIVE TRUSTS.

256. CONSTRUCTIVE trusts are trusts imposed by law, irrespective of any presumed intention of the party to create a trust, in order to prevent manifest injustice. These trusts arise in two great classes of cases : first, cases of fraud ; and secondly, cases where fraud is not necessarily imputed to the party, but where the presumption of a trust is essential to work out, or to preserve, a clear, equitable right in the property in question. No definition can indicate very clearly or accurately this second class ; the instances under it are not numerous, and they can be understood only by considering them in detail. To avoid repetition the cases under the first class — of fraud — will be considered when I come to treat of that subject as a distinct head of equity jurisprudence. I shall now briefly enumerate the more important instances of those constructive trusts which are implied by law in order to preserve clear, equitable rights.

257. FIRST, THE AGREED VENDOR OF REAL ESTATE IS A TRUSTEE. — Whenever the owner of real estate makes a valid contract to sell it, he thereupon becomes a trustee of the title for the vendee until he conveys it.¹ Here equity treats that as done which ought to be done. It regards the vendee as the true owner of the property, and as against him the vendor can do nothing to impair his title to the property. In equity the vendor holds the title strictly for the use of the vendee. If he dies, the estate passes to his heirs charged with

¹ *Holroyd v. Marshall*, 10 H. L. C. 191 ; *Rose v. Watson*, 10 H. L. C. 672, 683 ; [*Wall v. Bright*, 1 J. & W. 494, 500 ; *McKay v. Carrington*, 1 McLean, 50 ; *Reed v. Lukens*, 44 Pa. St. 200. In such a case the vendor's interest in the land is personalty and goes to his executors ; the vendee's interest is realty and goes to his heirs : *Moore v. Burrows*, 34 Barb. 173 ; *Rutherford v. Green*, 2 Ired. Eq. (N. C.) 121. For a case where the property was personal, see *Currie v. White*, 45 N. Y. 822.]

the same obligation, and a court of equity will compel them to make the transfer.¹ This rule holds good not only against the vendor himself and his heirs, but also against all persons, except attaching creditors, and purchasers for a valuable consideration without notice of the vendee's claim.² If the vendor succeeds in selling to some other genuine purchaser who has no notice of the previous contract, such purchaser will take a good title even as against the original vendee, and the latter's only remedy will be an action at law against the vendor to recover damages for breach of the contract.

258. But with these exceptions (of creditors and *bond fide* purchasers) the vendee's equity is paramount against all the world, — the vendor, his heirs or devisees or donees, persons not in the position of purchasers for value whether with or without notice, and also purchasers for value who are chargeable with notice. Assignees in insolvency or bankruptcy, and creditors under a general assignment, are not purchasers for value under this rule.³ (What constitutes a contract for the sale of land will be considered under the proper head, namely, specific performance of contracts.⁴)

259. VENDOR'S LIEN FOR THE PURCHASE-MONEY. — Another trust which arises by equitable construction is the vendor's lien upon real estate for the purchase-money. Under this rule (wherever it prevails), the vendor of real estate has a lien upon it for the payment of the purchase-money, and the purchaser holds the land subject to this right of the vendor. It is called, for convenience, a trust. Practically, it is an incumbrance upon the land itself, which equity will enforce for the benefit of the vendor, not only against the original purchaser, but also against all others who may have purchased the land subsequently with notice that the original consideration had not been paid. The theory upon which

¹ *Tiernan v. Roland*, 15 Pa. St. 429; *Smith v. Bean*, 8 N. H. 15. In Massachusetts, executors and guardians may be authorized by the court to make such transfers. Pub. Stat. 142, § 1.]

² [*Wickman v. Robinson*, 14 Wis. 493; *Ross v. Parks*, 93 Ala. 153.

As to what is notice in such a case, see *Kerr v. Day*, 14 Pa. St. 112; *Daniels v. Davidson*, 16 Ves. 249; *Thorn v. Phares*, 35 W. Va. 771. See, also, *infra*, p. 510.]

³ [*Whitworth v. Davis*, 1 V. & B. 545.]

⁴ [*See infra*, p. 396.]

this lien is supported is the very broad one that it is unjust that a person should hold land obtained from another without paying for it, and therefore equity converts the purchaser into a trustee of the title for the benefit of the vendor. The injustice, indeed, is not more apparent in this case than in that of the sale of personal property; but in the latter case it is the universal rule that the vendor's lien is lost by delivery of the property to the vendee.

260. This principle of the vendor's lien upon real estate has always prevailed in England, but in this country there is no uniformity of judicial opinion upon the subject.¹ It has recently been held that the English doctrine does not apply in Massachusetts.² Perry on Trusts (note to § 232) gives a list of States where the vendor's lien upon real estate does or does not exist. The Federal courts follow in each State the rule which may have been adopted in that State, because it is a rule of property. In the absence of a State decision upon the subject, they follow the English doctrine.

261. WAIVER OF LIEN. — In general, the taking of other security is considered in the United States as a waiver by the vendor of his lien upon the estate. There is, however, no inflexible rule upon the subject. It is said to be a question of fact in each case whether or not the acceptance of other security amounts to a waiver of the lien. As a general rule, it may be stated that the acceptance of other security furnishes a strong presumption of waiver. In many instances such acceptance would be inconsistent with the idea of a continuance of the lien, as when the vendor takes, for a part or for the whole of the purchase-money, a mortgage of the estate sold. In such a case he will be held to have relied upon that special security. Such was *Brown v. Gilman*.³

Lord Eldon regretted that the acceptance of other security was not held of itself to be a waiver. In *Mackreth v. Symmons* ⁴ he said: "If I had found it laid down in distinct and

¹ [See Pomeroy's Eq. § 1249.]

³ 4 Wheat. 255, 291.

² Ahrend v. Odiorne, 118 Mass.

⁴ 15 Ves. 329, 342.

inflexible terms, that where the vendor of an estate takes a security for the consideration, he has no lien, that would be satisfactory.”¹

262. THE CAPITAL STOCK OF A CORPORATION IS A TRUST FUND for its creditors. The property of a corporation is primarily a fund for the payment of its debts, and no distribution of its assets among its stockholders to the prejudice of its creditors will be tolerated. Whenever, and so far as, its assets can be traced in the hands of stockholders or of others than *bonâ fide* creditors or purchasers, equity will lay hold of them, and will apply them to the payment of the debts of the corporation. It is said that the corporate property is chargeable with a trust in favor of its creditors, and this trust a court of equity will enforce.²

263. UNPAID SUBSCRIPTIONS. — But a more important function of a court of equity arises in behalf of creditors when subscriptions to the capital stock of a corporation have not fully been paid in by the stockholders. The nominal capital stock of a corporation is the fund to which its creditors have a right to look for the payment of their debts. If it has once been paid in by its stockholders and invested, creditors may levy upon the property itself, if it be in such form as to be reached by legal process; or, if it has been divided among the stockholders, equity will compel them to account for it, as we have already seen. But suppose the capital stock has not been paid in, what is the remedy? It

¹ [In the United States the taking of security is much stronger evidence of waiver than it is in England. See Perry on Trusts, § 237. Taking a deed of other property as such security is a waiver: *Coit v. Fougere*, 36 Barb. 195. So where a mortgage is taken on the estate conveyed: *Stuart v. Harrison*, 52 Iowa, 511. So where a bond or deed with surety is taken from the vendee: *Williams v. Roberts*, 5 Ohio, 35; *Marshall v. Christmas*, 3 Humph. (Tenn.) 616; *Pomeroy's Eq. § 1252.*]

² Curtis, J., in *Curran v. Arkansas*, 15 How. 304; [*Hastings v. Drew*, 76 N. Y. 9; *Hill v. Fogg*, 41 Mo. 563; *Wood v. Dummer*, 3 Mason, 307; *Clapp v. Peterson*, 104 Ill. 26. The common-law action of assumpsit does not lie against a stockholder under such circumstances: *Spear v. Grant*, 16 Mass. 9. A bill to apply the property of a corporation to its debts cannot be brought by a single creditor for his sole benefit; he must allege that it is brought on behalf of all the creditors: *Pullman v. Stebbins*, 51 Fed. Rep. 10. But see *infra*, p. 390.]

often happens that the capital stock of a corporation is nominally fixed at one sum,—a very large one,—but the amount actually paid in by the original stockholders is a very small one, or at least less than the full amount. An agreement is sometimes made between a corporation and its original projectors, that upon paying only a certain percentage of their subscriptions they shall receive certificates for their shares, as if the shares were fully paid up, and they shall not be liable for any further assessment on the stock. Thus, by paying twenty-five cents on a dollar, a stockholder may receive certificates for say one hundred shares, when in fact he has paid only one quarter of the par value of the shares; and a corporation, the nominal capital of which is \$100,000, and which holds itself out to the world as having that amount, in reality has only \$25,000 capital. Now, as between the corporation and its stockholders, such an agreement, unless prohibited by the statute of the State creating the corporation, is valid and binding.¹

264. But as between the corporation and its stockholders on the one side, and its creditors on the other, such an agreement is utterly illegal and void. As respects creditors, the nominal capital stock of a corporation is a fund dedicated to the payment of its debts. The corporation holds out to the public that it has this fund, and it cannot have it unless the full amount of the subscription has been paid in. Any agreement between stockholders and the corporation itself whereby the fund to which creditors have a right to look is diminished, or rather in fact was never created, is a fraud upon the creditors, and a court of equity will therefore compel stockholders to pay in the proper amount whenever this is necessary for the payment of creditors.²

¹ *Scovill v. Thayer*, 105 U. S. 143, 153; [*Harrison v. Arkansas Valley R. Co.* 4 McCrary, 264; *Osgood v. King*, 42 Iowa, 478.]

² [*Allibone v. Hager*, 46 Pa. St. 48; *Mann v. Cook*, 20 Conn. 178; *Henry v. Vermilion R. R. Co.* 17 Ohio, 187; *Great Western Tel. Co. v. Gray*, 122 Ill. 630; *Crawford v. Rohrer*, 59 Md. 599. Stockholders may thus be compelled to pay up, even although it is provided in the charter that shares shall be forfeited in case of failure to pay the amount called for upon them. The remedies are cumulative. *Sagory v. DuBois*, 3 Sandf. Ch. 466. It has been held otherwise where the creditor

265. This personal liability for unpaid subscriptions or assessments is not confined to the original stockholders, but ordinarily applies also to the subsequent holder of the stock.¹ In *Webster v. Upton*,² it was held, in a very able opinion by Mr. Justice Strong, that a stockholder purchasing from an original holder is liable for assessments upon his shares in behalf of creditors, if the shares had not been paid for in full by the original holder, although his certificates read, "Non-assessable."³ The rights of creditors cannot be defeated by any agreement of the company with the shareholders that shares shall not be assessed; and this liability attaches to the ownership of the unpaid shares, unless the purchaser took them in ignorance of the fact that the full subscription had not been paid.⁴

266. The law of Massachusetts in reference to the liability of stockholders for unpaid subscriptions to stock is peculiar, forming an exception to the general equity rule upon this subject. The statutes of Massachusetts provide (and

had notice of such an agreement, — there being no fraud upon him. See *Hospes v. Northwestern Car Co.* 48 Minn. 174.]

¹ [*Wakefield v. Fargo*, 90 N. Y. 213; *Cook on Stock and Stockholders*, § 256. As to who is a holder of stock, see *Pittsburgh R. R. Co. v. Applegate*, 21 W. Va. 172; *Aultman's Appeal*, 98 Pa. St. 505; *Henkle v. Salem Manufacturing Co.* 39 Ohio St. 547; *Bell's Appeal*, 115 Pa. St. 88.]

² 91 U. S. 65.

³ [It does not appear that the purchaser in this case was a *bonâ fide* purchaser; it seems more probable that he knew, when he bought the shares, that they were not fully paid up. And this construction appears to have been put upon the case; for Judge Dillon subsequently decided (citing *Webster v. Upton*) that a *bonâ fide* purchaser for value is not liable for the amount remain-

ing unpaid on shares bought by him, provided there is nothing on the face of the shares to indicate that they were not paid up. *Steady v. Little Rock R. R.* 5 Dillon C. C. 348. See, also, to the same effect, *Erskine v. Loewenstein*, 82 Mo. 301; *West Nashville Co. v. Nashville Bank*, 86 Tenn. 252; *Young v. Erie Iron Co.* 65 Mich. 111; *Brant v. Ehlen*, 59 Md. 1. Moreover, in a preceding case at the same term, the Supreme Court, in their opinion, expressly exempted from the liability now in question "holders who have taken it [stock] *bonâ fide* for a valuable consideration and without notice:" *Sanger v. Upton*, 91 U. S. 56, 60. See, further, *Cook on Stock*, etc. § 257.]

⁴ Other cases upon this subject are, *Scammon v. Kimball*, 92 U. S. 362; *County of Morgan v. Allen*, 103 U. S. 498.

have done so from earliest times) that where the shares in the capital stock of a corporation are subscribed for, and an assessment has duly been laid thereon by the directors, and the subscriber neglects to pay the assessment, the shares may be sold at auction, so far as is necessary to pay the assessment.¹

267. It has long been settled in Massachusetts (1) That the stockholder, in the absence of an express promise, is under no personal liability to pay assessments,² but that the only remedy is a sale of his stock as provided in the statute.

(2) That an agreement to subscribe for and to take a certain number of shares in a corporation does not amount to the necessary promise to pay any lawful assessment which may be laid thereon. Under such an agreement, no personal liability to pay the assessments is incurred. The only remedy is a sale of the subscriber's shares.

(3) But if the stockholder or subscriber has expressly promised not only to take, but also to pay for, a certain number of shares, then he is personally liable on this express promise to pay, and he may be sued directly for any unpaid assessment, and the company is not obliged to sell his shares at auction as provided in the statute. The company has its election to do either; if it sells the stock, and not enough is realized to pay the assessment, the stockholder is then personally liable for the balance.³

268. There is also in Massachusetts a provision for the protection of creditors when a corporation does business or incurs debts before its capital stock has been paid in full. It is provided that the members or stockholders shall jointly

¹ Pub. Stats. ch. 106, § 44.

² [That by the general equity rule a subscriber is liable for the full amount of his shares without an express promise, and despite a provision for forfeiture, see *Upton v. Tribilcock*, 91 U. S. 45; *White Mountains R. R. Co. v. Eastman*, 34 N. H. 124; *E. T. & Va. R. R. Co. v. Gammon*, 5 Sneed (Tenn.), 567;

Lake Ontario R. R. Co. v. Mason, 16 N. Y. 451.]

³ *Mechanics' Foundry v. Hall*, 121 Mass. 272; *Katama Land Co. v. Jernegan*, 126 Mass. 155; *City Hotel v. Dickinson*, 6 Gray, 586, 595; *Atlantic Cotton Mills v. Abbott*, 9 Cush. 423; *Boston, Barre, &c. R. R. v. Wellington*, 113 Mass. 79, 87; [*Cook on Stock and Stockholders*, § 71.]

and severally be liable for all debts incurred before the original capital is paid in full; but only those stockholders who have not paid in full the par value of their shares, or those who have purchased such shares with knowledge that they are not paid up, shall be liable for such debts.¹

In Massachusetts, therefore, an original stockholder is liable for all debts of the company incurred before he has paid the full par value of his stock; but a transferee of unpaid shares, who purchases in ignorance of the fact that they have not been paid for in full, is not personally liable either for any assessments on the stock, or to any creditors of the corporation for its debts.

269. WHAT AMOUNTS TO PAYMENT OF STOCK SUBSCRIPTIONS. — A court of equity not only holds stockholders to the duty of payment, it also reprobates and disallows any sham payment.² A merely nominal payment by a stockholder, any trick by which the form of a payment may be gone through with, leaving the corporation no better off in fact for the performance, is not such payment as will discharge the stockholder. A mere exchange of cheques, by which the stockholder pretends to pay and the company pretends to loan the same amount back to the stockholder, would be held to be no payment in fact, but a mere subterfuge.

In *Sawyer v. Hoag*³ it was held that an arrangement by which the stock was nominally paid in, the money being immediately taken back as a loan to the stockholder, was a mere device to change the debt from a stock debt to a loan, and was not a valid payment as against the creditors of the corporation, although it might be good as between the company and the stockholder himself.

270. Where the statute or the corporation charter requires cash payment, cash must be paid, and no substitute is sufficient.⁴ The statutes of Massachusetts originally required that all subscriptions for stock should be paid in cash,

¹ Pub. Stats. ch. 106, § 61.

St. 199; *Durant v. Abendroth*, 69

² [*Downie v. White*, 12 Wis. 176; *N. Y.* 148. For the statutory provisions in the various States, see *Beach on Private Corporations*,

³ 17 Wall. 610, cited *supra*.

see *Beach on Private Corporations*,

⁴ [*Noble v. Callender*, 20 Ohio § 563.]

and this is the present rule with one exception, namely, property which it is lawful for the corporation to have may be turned in for its value upon satisfying the commissioner of corporations that the value is fairly estimated.¹

271. A similar provision exists in the case of special partnerships, a special partner being held bound as a general partner for all debts of the firm, unless his contribution to the firm capital is made in "actual cash payment."² It has been held that nothing less than money will satisfy this requirement, and therefore even that payment in United States bonds, although they were worth more than their par value, was not payment within the statute; and the special partner in this case was held liable for all the debts of the firm.³

In *McGinnis v. Farelly*⁴ it was decided by Judge Wallace that payment by a cheque, although the drawer had sufficient funds in bank, was not actual "cash payment" within the terms of a similar New York statute.

¹ Pub. Stats. ch. 106, §§ 47, 48.

² *Haggerty v. Foster*, 103 Mass.

³ [*Richardson v. Hogg*, 38 Pa. 17.

St. 153; *Durant v. Abendroth*, 69

⁴ 27 Fed. Rep. 33.

N. Y. 148.]

CHAPTER XII.

TRUST ESTATES.

272. A HUSBAND has a right of curtesy in the equitable estate of his wife,¹ but the wife has no dower in the equitable estate of the husband.² This was the rule in England until it was changed by a statute³ making the wife dowable in lands of which the husband possessed the beneficiary interest. In Massachusetts the original rule still holds good, that the husband has his curtesy but the wife has not her dower.⁴

273. THE RULE AGAINST PERPETUITIES applies to trusts and equitable estates with as much force as to legal estates.⁵ That rule is that all future estates must vest within a particular life or lives in being at the death of the testator and twenty-one years and a fraction (nine months, the period of gestation) thereafter. If the estate is created or limited by deed *inter vivos*, the lives in being must be those of persons who are living at the execution of the deed and not merely at the death of the grantor or settlor.⁶

274. Applying this rule to trusts, no trust can be created

¹ [Cunningham v. Moody, 1 Ves. Ill. 290; Powell v. Monson Co. 3 Sen. 174; Cushing v. Blake, 30 N. Mason, 347; Prescott v. Walker, 16 J. Eq. 689; Robison v. Codman, 1 N. H. 340, 343; Cowman v. Hall, 3 Sumner, 121.] Gill & J. 398.]

² [Miller v. Stump, 3 Gill, 304; ³ 3 & 4 Wm. IV. ch. 105.
Hamlin v. Hamlin, 19 Me. 141; ⁴ Reed v. Whitney, 7 Gray, 533;
Stelle v. Carroll, 12 Peters, 201; Lobdell v. Hayes, 4 Allen, 187;
Dixon v. Saville, 1 Bro. Ch. 326. Gardner v. Hooper, 3 Gray, 398;
Contra, Dubs v. Dubs, 81 Pa. St. 149; Simonds v. Simonds, 112 Mass. 157;
Lewis v. James, 8 Humph. (Tenn.) Loring v. Blake, 98 Mass. 253.
537; Mershon v. Duer, 40 N. J. ⁵ [Duke of Norfolk v. Howard,
Eq. 333. 1 Vernon, 163.]

Of course there is practically ⁶ Brattle Square Church v. Grant, neither dower nor curtesy in a 3 Gray, 142; Perry on Trusts, § 880, trustee's estate. Bailey v. West, 41 and cases cited.

which will postpone the vesting of the legal estate in the ultimate taker beyond lives in being at the death of the testator and twenty-one years thereafter. In other words, no trust can lawfully be created to continue beyond twenty-one years after the death of the last survivor of persons who were living at the death of the testator.¹

For example, suppose a testator devises an estate to a trustee upon trust to pay the income to his daughter during her life, directing that after her death the income shall accumulate for twenty-five years, and then that the whole estate shall be divided among her children, if any, or, if not, then to the testator's heirs at law. Here the devise over evidently is too remote, and is void for that reason. The only life in being at the testator's death to which he refers is that of his daughter; and as the gift over cannot take effect within twenty-one years after her death, but not until twenty-five years thereafter, it is within the rule and is void. This was the case of *Hooper v. Hooper*.²

The result was the same where a testator directed a fund to accumulate for the term of fifty years after his death. Inasmuch as it was not certain that this period would not exceed the term of twenty-one years added to any lives which he might have selected, the gift over was held void for remoteness.³

275. The general rule is, that if a gift over be too remote, it is absolutely void.⁴ The limitation is not good for the term during which it might have lasted and void for the excess,—it is absolutely void. But all prior gifts stand in the same situation as if the devise over had been wholly omitted. If, for example, the prior gift was in fee, the estate is vested in the first taker discharged of the limitation over. (Of this, the case of *Brattle Square Church v. Grant* ⁵

¹ [Schettler v. Smith, 41 N. Y. 328; Sears v. Putnam, 102 Mass. 5.]

² 9 Cush. 122.

³ Thorndike v. Loring, Exr. 15 Gray, 391. For another illustration, see Sears v. Russell, 8 Gray, 86. Cases where the devise over

was held not too remote are: Lovering v. Worthington, 106 Mass. 86; Hills v. Simonds, 125 Mass. 536. [See *infra*, p. 196.]

⁴ [Langdon v. Simpson, 12 Ves. 295; Lewis on Perpetuities, 593.]

⁵ 3 Gray, 142.

is a leading illustration.) If the prior gift was for life, it takes effect as a life estate, and the void gift over goes to the heirs at law, or to the devisee of the residue of the testator's estate, just as if the void clause had not been inserted in the will.¹

Quantum of Trustee's Estate.

276. The next point for consideration is the quantum of estate taken by a trustee. The general rule is, that a trustee takes such an estate, irrespective of the particular words of the grant, as it is necessary for him to hold in order to carry out the purposes of the trust, and no more.

In an ordinary deed the word "heirs," for instance, is necessary to convey a fee simple. But it is not so in an instrument creating a trust, whether it be a deed or a will.² If the purposes of the trust require that the trustee take an estate in fee simple, such effect will be given to the deed or devise, although there are no words of inheritance.

277. Two rules of construction have been settled: "First, whenever a trust is created, a legal estate sufficient for the purposes of the trust shall, if possible, be implied in the trustee, whatever may be the limitation in the instrument, whether to him and his heirs or not.³ Second, Although a legal estate may be limited to a trustee to the fullest extent as to him and his heirs, yet it shall not be carried farther than the complete execution of the trust requires."⁴

In *Neilson v. Lagow*⁵ the court said that the legal estate

¹ [Hawley v. James, 5 Paige, 318; MacDonald v. Brice, 2 Keen, 276. See, also, Philadelphia v. Girard, 45 Pa. St. 9; Phelps v. Pond, 23 N. Y. 69.]

² [Fisher v. Fields, 10 Johns. 495; Neilson v. Lagow, 12 How. 98; Chamberlain v. Thompson, 10 Conn. 243; Cleveland v. Hallett, 6 Cush. 403; Preachers' Aid Society v. England, 106 Ill. 125; Ivory v. Burns, 56 Pa. St. 300. Where a power of sale is given to a trustee, it necessarily conveys a fee: Spessard v. Rohrer, 9 Gill, 261.]

³ [Oates v. Cook, 3 Burr, 1684; Stearns v. Palmer, 10 Met. 32; Deering v. Adams, 37 Me. 265; Baptist Society v. Hail, 8 R. I. 234; Nelson v. Davis, 35 Ind. 474.]

⁴ Quoted by Perry, § 312; [Barker v. Greenwood, 4 M. & W. 421, 429; Warter v. Hutchinson, 1 B. & C. 721; Koenig's Appeal, 57 Pa. St. 352; West v. Fitz, 109 Ill. 425; Wilcox v. Wheeler, 47 N. H. 488; Ellis v. Fisher, 3 Sneed, 231.]

⁵ 12 How. 98, 107. See, also Doe v. Considine, 6 Wall. 458.

vested in trustees "is commensurate with the interest which they must convey in execution of the trust."

In *Sears v. Russell*¹ the court said: "The rule is well settled that trustees will be held to take that quantity of interest in estates devised to them which the exigencies of the trust may demand; . . . and the legal estate vested in them must be commensurate with the estate which they are bound to convey. If they are to grant a fee, it is necessary they should have a fee."²

278. It is equally true, on the other hand, that the estate which the trustee ultimately holds is limited by the exigencies of the trust. For example, if the conveyance or devise is expressly to the "trustee and his heirs," thus creating in terms a fee simple, yet if it is upon trust to hold the estate and to pay the rents thereof to A during his life, the trust here terminates with the life of A, and the legal estate held by the trustee terminates then also, and the estate reverts as a matter of course to the donor or his heirs.

It is an inflexible rule that the trustee, as such, can derive no personal advantage from the trust estate; and if it is not all required for the purposes of the trust, the excess, whether it be real or personal estate, does not belong to him, but to the donor or to his estate.³

279. Another important rule is, that the trust adheres to the trust property through all its mutations, so long as it can be traced and identified.⁴ No matter how many times it may have been sold or resold, if the fund can be traced, in whatever form it may ultimately be invested, if its identity has been preserved, the trust adheres to it.⁵

¹ 8 Gray, 86.

² *Slade v. Patten*, 68 Me. 380.

³ [See cases *supra*, p. 138.]

⁴ [Allen v. Russell, 78 Ky. 105; Holmes v. Gilman, 138 N. Y. 369; Englar v. Offutt, 70 Md. 78; McLaughlin v. Fulton, 104 Pa. St. 161; Cobb v. Knight, 74 Me. 253; Russell v. Allen, 10 Paige, 249; Barnard v. Hawks, 111 N. C. 333.]

⁵ [No trust results if the money be

taken by one not standing in a fiduciary relation to the owner: *Hawthorne v. Brown*, 3 Sneed (Tenn.), 462; *Lister v. Stubbs*, L. R. 45 Ch. D. 1. But see *Newton v. Porter*, 4 Lansing, 416; s. c. 69 N. Y. 133. *Third Nat. Bank v. Stillwater Gas Co.* 36 Minn. 75. A mere clerk does not stand in a fiduciary relation to his employer: *Campbell v. Drake*, 4 Ired. Eq. (N. C.) 94. Nor a cash-

Thus, if the original trust funds were invested in stocks or bonds, and these have been sold and the proceeds invested in other stocks or bonds, or real estate, or property of any description, but the title was taken in the name of the trustee individually, the stocks or bonds, or real estate, as the case may be, are nevertheless in equity considered as held by the trustee strictly in trust.¹

280. If the trustee has reduced the estate to money and mingled it with his own, so that no distinction of it whatever has been preserved, then equity is foiled and the party becomes merely a debtor, or, more properly speaking, an embezzler to that extent.² (But as to funds in bank, see *Pennell v. Deffell*.³)

281. This is a very important principle, especially in cases of bankruptcy and insolvency. If a trustee fails, holding trust property, although in his own name, if it can be traced and identified, it does not pass to his assignee or creditors, but the trust is upheld for the benefit of the true beneficiary.⁴ Judge Story has thus stated the rule: "It matters not in the slightest degree into whatever other form, different from the original, the change may have been made, whether it be that of promissory notes, or of goods or of stock; for the product of, or a substitute for, the original thing still follows the nature of the thing itself, so long as it can be ascertained to be such. The right ceases only when the means of ascertainment fail, which of course is the case when the subject-matter is turned into money, and mixed and confounded in a general mass of property of the same description."⁵

ier: *Pascoag Bank v. Hunt*, 3 Edw. Ch. 583. *Contra*, *Bank of America v. Pollock*, 4 Edw. Ch. 215.]

¹ [*Houghton v. Davenport*, 74 Me. 590.]

² [*Thompson's Appeal*, 22 Pa. St. 16; *McComas v. Long*, 85 Ind. 549; *Union Nat. Bank v. Goetz*, 138 Ill. 127; *Snorgrass v. Moore*, 30 Mo. App. 232. But if a man mixes trust funds with his own, the whole

will be treated as trust property as against him, except so far as he may be able to distinguish what is his own. *Drake v. Wild*, 65 Vt. 611.]

³ 4 De G., M. & G. 372.

⁴ [*Taylor v. Plummer*, 3 M. & S. 562; *McLaren v. Brewer*, 51 Me. 402; *Thompson v. Perkins*, 3 Mason, 232; *Harrison v. Smith*, 83 Mo. 210.]

⁵ 2 Story's Eq. § 1259.

282. The United States Supreme Court passed upon this question in *Cook v. Tullis*,¹ and thus laid down the law: "It is a rule of equity jurisprudence perfectly well settled and of universal application, that where property held upon any trust to keep or use or invest it in a particular way is misapplied by the trustee, and converted into different property, or is sold and the proceeds are thus invested, the property may be followed wherever it can be traced through its transformations, and will be subject, when found in its new form, to the rights of the original owner or *cestui que trust*. . . . It cannot alter the case that the newly acquired property, instead of being purchased with the proceeds of the original property, is obtained by a direct exchange for it. The real question in both cases is, what has taken the place of the property in its original form? Whenever that can be ascertained, the property in the changed form may be claimed by the original owner, or the *cestui que trust*, and assignees and trustees in bankruptcy can acquire no interest in the property in its changed form which will defeat his rights in a court of equity." This was a case between the rightful owner and the trustees or assignees of a bankrupt. The bankrupt, holding in trust government bonds, had exchanged them for a bond and mortgage. It was held that the trust attached to the latter, and that the bankrupt's creditors or assignees had no claim thereto.

283. By the deposit of trust funds in a bank in the name of the depositor (not as trustee) the fund does not lose its fiduciary character although it is mixed with personal funds of the depositor, and it may be reached and held.² And when amounts have subsequently been withdrawn, it must be presumed that they are drawn from the private and not from the fiduciary funds.³

¹ 18 Wall. 332, 341.

² [*Overseers of the Poor v. Bank of Virginia*, 2 Gratt. 544; *National Bank v. King*, 57 Pa. St. 202; *Van Alen v. American National Bank*, 52 N. Y. 1.]

³ *Knatchbull v. Hallett*, L. R. 13

Ch. D. 696; *National Bank v. Insurance Co.* 104 U. S. 54; *First National Bank v. Armstrong*, 36 Fed. Rep. 59; [*McLeod v. Evans*, 66 Wis. 401; *Hall v. Otis*, 77 Me. 122.]

284. The trust adheres to the property in the hands of any person,¹ except a *bonâ fide* purchaser for a valuable consideration, or a creditor without notice.² He must be a purchaser for a valuable consideration, not one to whom a conveyance is made out of friendship or affection, as where the object is to provide for a wife or children.³

Moreover, the purchaser must be without notice when he pays the consideration; otherwise he will not be protected. Mr. Justice Story said in *Wormley v. Wormley*,⁴ "It is a settled rule in equity that a purchaser without notice, to be entitled to protection, must not only be so at the time of the contract or conveyance, but at the time of the payment of the purchase-money."⁵

285. NOTICE THAT THE TITLE IS FIDUCIARY IS SUFFICIENT. — It is well settled that whoever has notice that the title of another is fiduciary, as that of a trustee or executor, is thereby charged with notice of all the limitations of the trust, because it thereupon becomes his duty to inquire what those limitations are, and consequently he cannot acquire any title to the property inconsistent with the trust. If a

¹ [Bassett v. Nosworthy, Cas. temp. Finch, 102; McCarthy v. Provident Institution for Savings, 159 Mass. 527; Union Society v. Mitchell, 26 Mo. App. 206; Ten Eick v. Simpson, 1 Sandf. Ch. 244; McLaughlin v. Fulton, 104 Pa. St. 161; Ferrie v. Errol, 59 N. H. 234; Union Mutual Insurance Co. v. Spaulds, 99 Ill. 249; Lathrop v. Bampton, 31 Cal. 17.]

² [Barker v. Frye, 75 Me. 29; Hagthorp v. Hook, 1 Gill & J. 270; Milner v. Hyland, 77 Ind. 458.]

³ [Mansell v. Mansell, 2 P. Wms. 691; Swan v. Ligam, 1 McCord Ch. 227. One who takes by descent is not a *bonâ fide* purchaser for value: Derry v. Derry, 74 Ind. 560. Nor is an attaching creditor at common law: Houghton v.

Davenport, 74 Me. 590. But mere inadequacy of consideration is not sufficient ground for converting a purchaser into a trustee: More v. Mayhow, 1 Ch. Cas. 34. See further, as to who is a *bonâ fide* purchaser, *infra*, p. 508.]

⁴ 8 Wheat. 421, 449, 450.

⁵ [Tourville v. Naish, 3 P. Wms. 306; Blanchard v. Tyler, 12 Mich. 339; Jewett v. Palmer, 7 Johns. Ch. 65; Patten v. Moore, 32 N. H. 382; Everts v. Agnes, 4 Wis. 343. Not only must the purchase-money have been paid, but the conveyance must have been taken, without notice, to make the grantee a *bonâ fide* purchaser. Wigg v. Wigg, 1 Atk. 382, 384; Bush v. Bush, 3 Strob. Eq. 131; Doswell v. Buchanan, 3 Leigh (Va.), 365.]

purchaser has notice that the title of the vendor is that of a trustee, he is bound to ascertain whether the terms of the trust authorize the trustee to sell or dispose of the property in the manner proposed.¹

286. If a trustee attempts to pledge stock standing in his name as trustee, for his own debt, the transaction upon its face is a fraud upon the trust and is void, because the creditor, knowing that the title of the debtor is only that of a trustee, is also bound to know that he cannot pledge or apply it for his private debts.² So, if an executor attempts as such to convey or deal with the real estate of his testator, the transaction is *prima facie* void, because by law an executor has power, *virtute officii*, only over the personal estate.³ The other party, therefore, is put upon inquiry, and must ascertain for himself whether the testator has by special provision in his will authorized the executor to dispose of his real estate, or whether the probate court has authorized the sale for payment of debts. This the purchaser must do at his peril. If, by any well-intended but erroneous construction of the will, it is assumed that such power exists, and a conveyance is accordingly made, the purchaser takes nothing as against the heirs.

287. If a trustee unlawfully disposes, either by sale or pledge, of corporate shares, and the corporation, having actual or implied notice, consents to and assists the unlawful transfer, it is liable to the owner for the value of the stock.⁴ Here, too, the fact that the stock stands in the name of the holder as trustee is notice to the corporation of the trust, and it is not at liberty to recognize any transfer by the trustee inconsistent with his trust. Having notice that he holds in trust and not on his own account, the corporation, before it allows any transfer by sale or pledge of the stock, must ascertain

¹ [Third National Bank v. Lange, 51 Md. 138; Bundy v. Town of Monticello, 84 Ind. 119. *Contra*, Albert v. Savings Bank of Baltimore, 1 Md. Ch. 407.]

² [Duncan v. Jaudon, 15 Wall. 165; Jaudon v. City Bank, 8 Blatch. 430. See, also, Pendleton v. Fay, 2 Paige, 202.]

³ [See, also, *infra*, p. 176.]

⁴ [Mechanics' Bank v. Seton, 1 Peters, 299; Porter v. Bank of Rutland, 19 Vt. 410; Bohlen's Estate, 75 Pa. St. 304.]

whether the trustee has authority by the terms of his trust either to sell or to pledge.¹

This rule was first applied by Chief Justice Taney, in *Lowry v. Commercial & Farmers' Bank*,² to a pledge for his own debt of stock held by an executor. It was decided in that case that the corporation, having notice that the stock held by the executor was improperly transferred by him for his own debt, was itself chargeable for the wrong. The court held that in this respect a corporation stands in the relation of a trustee toward its stockholders, and is bound to the exercise of good faith and reasonable care in the discharge of the trust. The court said: "The corporation is thus made the custodian of the shares of stock, and clothed with power sufficient to protect the rights of every one interested from unauthorized transfers. It is a trust placed in the hands of the corporation for the protection of individual interests, and, like every other trustee, it is bound to execute the trust with proper diligence and care, and is responsible for any injury sustained by its negligence or misconduct. . . . In this case the rights of stockholders, and of persons interested in its stock, were placed by law under the guardianship and protection of the bank, so far as concerned the transfers on their books: the stock could not be transferred, could not become the legal property of another person, without the permission of the proper officers of the corporation.³ And if these officers, at the time of the transfer, had reason to believe that the executor, by the act of transfer, was converting this stock to his own use, in violation of his duty, then the bank, by permitting the transfer knowingly, enabled the executor to commit a breach of his trust, and, upon principles of justice and equity, is as fully liable as if it had shared in the profits of the transaction. The object of the executor could not have been accomplished without the coöperation of the bank in permitting the transfer to be made on its books."

¹ [Stewart v. Fireman's Insurance Co. 53 Md. 564; Caulkins v. Gaslight Co. 85 Tenn. 683. *Contra*, Albert v. Savings Bank, 2 Md. 159. But see Third National Bank v. Lange, 51 Md. 138.]

² Taney's Decisions, 310, 323.

³ Union Bank v. Laird, 2 Wheat. 390.

288. To the same effect is *Loring v. Salisbury Mills*,¹ where the defendant corporation was held liable for issuing a new certificate for stock held by a trustee and sold for his own purposes, without authority. The court thus state the rule: "All the authorities affirm such liability where the corporation has notice that the present holder is a trustee and of the name of his *cestui que trust*, and issues the new certificate without making any inquiry whether his trust authorizes him to make a transfer."

The qualification that the corporation must also know the name of the *cestui que trust* seems hardly sound. If it knows, as it must know from the form of the certificate, that the party holds as trustee, then the duty of inquiry arises, although it may not know who is the *cestui que trust*. This precise point was ruled upon in *Shaw v. Spencer*,² where it was held that the pledgee of a certificate of stock which read, "to A B, trustee," was put to the duty of inquiry, inasmuch as the very form of the certificate imported a trust. In reason, the same rule must be applicable to the corporation making the transfer.³

289. In *Duncan v. Jaudon*⁴ it was held that, where a certificate of stock shows upon its face that it is held in trust, notice is thus given to the taker of the stock, and the duty of inquiry is put upon him. If the stock be pledged by the trustee for a private loan, the pledge is void and the stock is chargeable with the trust in the hands of the pledgee, and he is accountable for its value if he has sold it. The same doctrine was held in *Shaw v. Spencer*,⁵ the certificate in that case being to "A B, trustee," not naming the *cestui que trust*. But the liability is not confined in such a case to the pledgee.

290. THE EQUITABLE INTEREST OF A CESTUI QUE TRUST IS ORDINARILY ASSIGNABLE, and subject to the claims of creditors.

It is settled both in England and in this country that,

¹ 125 Mass. 138, 151.

Railways v. The Queen, L. R. 7

² 100 Mass. 382.

H. L. 496.

³ See, also, *Shropshire Union*

⁴ 15 Wall. 165.

⁵ 100 Mass. 382.

where the income of a trust estate is given for life to any person other than a married woman, this equitable estate for life is alienable by the *cestui que trust*, and is also liable in equity for his debts upon a bill being brought by his creditors.¹

291. It is also well settled that a bequest or gift of the income, to cease upon the insolvency or bankruptcy of the *cestui que trust*, is good, and that the limitation is valid.² An example arises where there is a gift of the income to some other person contingent upon the insolvency of the original *cestui que trust*. In such a case the interest of the *cestui que trust* terminates, and neither he nor his creditors have any further right to the income.

292. If the limitation over, upon the bankruptcy of the *cestui que trust*, is to trustees, with a discretion to apply any or none of the income to the support of the bankrupt or his family, such a limitation is valid, according to the weight of American authority, and it vests no interest in the bankrupt which is either assignable by him or attachable by his creditors. This proposition depends upon the condition that the trustees have an absolute discretion in the matter which the bankrupt cannot in any way control. If he has any vested interest in the income by which he can require them to apply it for his benefit, then such vested interest is subject to the claims of his creditors.

This question arose in *Nichols v. Eaton*,³ and it was very ably discussed in the opinion delivered in that case by Mr. Justice Miller. It is there distinctly laid down that a lim-

¹ *Sparhawk v. Cloon*, 125 Mass. 263, and the cases there cited; *Broadway National Bank v. Adams*, 133 Mass. 170; [*Girard Life Insurance Co. v. Chambers*, 46 Pa. St. 485; *Baker v. Keiser*, 75 Md. 332; *Evans v. Wall*, 159 Mass. 164. And the estate of the *cestui que trust* passes to his assignee in bankruptcy: *Youghusband v. Gisborne*, 1 Coll. 400; *Green v. Spicer*, 1 R. & M. 395.]

² *Nichols v. Eaton*, 91 U. S. 716, and the cases cited therein; [*Bran-*

don v. Robinson, 18 Ves. 429; *Nichols v. Levy*, 5 Wall. 433, 441; *Sharpe v. Cosserey*, 20 Beav. 470. But if the interest is to be divested upon "alienation" alone, it will be divested only through a voluntary transfer, and not through a transfer by operation of law, such as bankruptcy: *Lear v. Leggett*, 2 Sim. 479. See, also, *Bonfield v. Hassell*, 32 Beav. 217; *In re Stulz Trusts*, 4 De G., M. & G. 404.]

³ 91 U. S. 716, affirmed in *Hyde v. Woods*, 94 U. S. 523.

itation over, giving such a discretionary power to trustees, is valid as against creditors, although it be made for the benefit of the insolvent.¹ The court go further, and take the position that there is no sound public policy, no consideration in behalf of creditors, which should prevent the donor of his own property from attaching such limitations to his gift as would continue to secure its benefits to the object of his bounty, in case the latter should be overtaken by insolvency. This decision has been followed in Massachusetts in cases presently to be cited.²

293. Where the original gift is to trustees to pay the income from time to time to the beneficiary, or to withhold it from him in their discretion, there is no doubt that nothing thereby vests in the *cestui que trust* which is assignable by him, or which can be reached for his debts.³

294. A settlement in trust expressly providing that the income shall not be alienable by the *cestui que trust* by anticipation, and shall not be subject to his creditors, is valid, although there is no cesser or limitation over of the estate in the event of the *cestui que trust's* bankruptcy or insolvency. This is the rule in the Federal courts and in many of the States. The English doctrine, on the other hand, is to the effect that, where the income of a trust estate is given for life to a person other than a married woman, the equitable estate is alienable by, and liable in equity for, the debts of the *cestui que trust*,⁴ and that this quality is so inseparable from the estate that no provision, however express, which does not operate as a cesser or limitation of the estate itself, can protect it from his debts. Several of the States follow the English rule. The cases are cited in *Broadway National Bank v. Adams*.⁵

295. This precise question arose for the first time in Massachusetts in the case just mentioned, and it was settled

¹ [Lord v. Bunn, 2 Y. & C. C. C. 487. See, also, Heath v. Bishop, 4 Rich. Eq. 46; Wemyss v. White, 159 Mass. 484.]

² See *infra*.

³ Hall v. Williams, 120 Mass. 344; Russell v. Grinnell, 105 Mass. 425; [Snowdon v. Dales, 6 Sim. 524; Twopenny v. Peyton, 10 Sim. 487. [Graves v. Dolphin, 1 Sim. 66.]
⁴ 133 Mass. 170. [See, also, East-
erly v. Keney, 36 Conn. 18; Mebane
v. Mebane, 4 Ired. Eq. (N.C.) 131.]

mainly upon the same grounds taken by Mr. Justice Miller in *Nichols v. Eaton*, *supra*. The gift by will was: "I give the sum of \$75,000 to my said executors . . . in trust to invest the same, . . . and to pay the net income thereof semi-annually to my brother C during his natural life, such payments to be made to him personally when convenient, otherwise upon his order or receipt in writing, in either case free from the interference or control of his creditors, my intention being that the use of said income shall not be anticipated by assignment."

The court say: "The rule of public policy which subjects a debtor's property to the payment of his debts does not subject the property of a donor to the debts of his beneficiary, and does not give the creditor a right to complain that, in the exercise of his absolute right of disposition, the donor has not seen fit to give the property to the creditor, but has left it out of his reach." This case was approved in *Baker v. Brown*.¹ The doctrine seems to me to be just.²

296. It is important to distinguish these cases from the case of a voluntary settlement by the owner of property in his own behalf. A person cannot settle his own property in trust to pay the income to himself for life, with a provision that it shall not be alienable by him or subject to his debts. Such a provision is contrary to the policy of the law, and is void.³

This rule applies to a married woman settling her private property, and also to a woman settling her property in anticipation of marriage.

¹ 146 Mass. 369.

30 Vt. 338; *Smith v. Towers*, 69 Md. 77.]

² [The following cases approve the doctrine: *Spindle v. Shreve*, 4 Fed. Rep. 136; *Lampert v. Haydel*, 20 Mo. Ap. 616; *Thackara v. Mintzer*, 100 Pa. St. 151; *Steib v. Whitehead*, 111 Ill. 247; *White v. White*,

³ *Pacific National Bank v. Windram*, 133 Mass. 175; *Jackson v. Von Zedlitz*, 136 Mass. 342; [*McIlvaine v. Smith*, 42 Mo. 45.]

CHAPTER XIII.

TRUSTEES AND CESTUIS QUE TRUSTENT.

Trustees.

297. APPOINTMENT AND ACCEPTANCE. — Trustees are originally appointed either by an instrument in writing *inter vivos* or by a will.

Where the appointment is by instrument *inter vivos*, the instrument ordinarily contains some covenants to be performed by the trustee, and in such case the trustee himself should be a party to the instrument and should sign it. In all cases it is advisable that he should signify his acceptance of the trust by a simple declaration in writing, "I accept the above trust."¹

In case of a trust created *inter vivos*, an acceptance in writing is not, however, legally necessary. Acceptance is a fact, and it may be proved by such acts on the part of the trustee as are consistent only with his having accepted the trust.²

298. In Massachusetts, trustees appointed by will must now in all cases give their personal bond for the faithful performance of their duties, and if they fail to comply with the order of the Probate Court in this respect, they "are deemed to have declined or resigned the trust."³

299. It is also usual in Massachusetts for a trustee appointed under a will, the will having been proved, to receive letters of trusteeship from the Probate Court, but these are

¹ [Patterson v. Johnson, 113 Ill. 642; Roberts v. Moseley, 64 Mo. 559.] 507. For cases where the acts of

² [Armstrong v. Morrill, 14 Wall. 138; Kennedy v. Winn, 80 Ala. 165; Delaplane v. Lewis, 19 Wis. 476; Burritt v. Silliman, 13 N. Y. 93; Flint v. Clinton Co. 12 N. H. 430; Harvey v. Gardner, 41 Ohio St. 195.]

³ Pub. Stats. ch. 141, §§ 16-18. (Act of 1877.)

not necessary to the authority of the trustee, inasmuch as he derives his authority entirely from the will.¹

In *Parker v. Sears*² the court said: "When trustees are required to give bond, as all trustees under a will are now, it is proper that they should obtain a letter of trust to certify their compliance with the requisitions of law in that behalf, but their authority to exercise the power and convey the estate is derived exclusively from the will."

In that case the trustees, who had received no "letter of trust," and had given no bond, having been exempted from so doing by the will (the case arose prior to the statute of 1877), made a conveyance in pursuance of the trust created by the will. Their authority was denied on the ground that they did not act under a "letter of trust" from the Probate Court, but, as I have said, such a letter was held to be unnecessary to the exercise of their power.

300. NEW TRUSTEES. — Where any vacancy occurs by the death, resignation, or removal of a trustee, if the instrument creating the trust provides a mode for the appointment of new trustees, that mode must be adopted.

If no provision is made in the original instrument, then the appointment must be made, as a general rule, by the Court of Equity, which has jurisdiction of the trust.

301. It is well settled that a person creating a trust may provide in the instrument for the appointment of new trustees, in case of a vacancy, and this he may do, either by naming the new trustees, or by giving a power of appointment.³

302. Very often the instrument provides that the appointment shall be made by the judge of probate for a certain county or by the judge of some other court. When this provision exists, and the judge appoints accordingly, he does not act by virtue of his office, but strictly and solely by virtue of his appointment under the will. The designation of him as judge of probate, etc., is merely *descriptio personæ*, and his course is legal if, in making the appoint-

¹ [Van Horne v. Fonda, 5 Johns. Ch. 388, 403.]

² 117 Mass. 513, 522.

³ Shaw v. Paine, 12 Allen, 293; [Lindow v. Fleetwood, 6 Sim. 152; 1 Perry on Trusts, § 287.]

ment, he simply follows the directions of the will, although the appointment would be insufficient if he were acting under his authority as a judge.

Thus in *Shaw v. Paine*,¹ where a new trustee was appointed by a judge of probate without notice to the parties interested, in pursuance of an authority given him by will to make the appointment in that mode, the court held that the appointment was valid, although as judge of probate he had no authority under the statute to appoint a new trustee without such notice.

In all cases, then, a new appointment is valid if, in making it, the directions contained in the original instrument creating the trust are complied with.

303. JURISDICTION TO APPOINT. — But if the trust deed or will does not provide for a new appointment, the appointment must be made by the court having jurisdiction of the matter.²

There is a distinction in this respect between trustees appointed under a deed, and those appointed under a will. If the trust is created by deed, and the property, or part of it, is invested in a State or county where some of the beneficiaries reside, the court of that State or county will take jurisdiction and appoint a new trustee. This was the case in *Bassett v. Crafts*.³ The court where the trustee resides may also act to remove a trustee or appoint a new one.⁴

304. If the trust is created by will, then only the court having jurisdiction over the will is competent to act in the matter.⁵ Where a trust is created by judicial decree, only the courts of the State where the decree was rendered have jurisdiction to enforce the trust. The trust cannot be enforced in another State, although the trustee personally resides there. He is accountable only in the jurisdiction of his appointment.

305. The decree establishing a will, by which a trust is

¹ 12 Allen, 293.

25 Barb. 81; *Wilson v. Towle*, 36

² [*Irvine v. Dunham*, 111 U. S. N. H. 129.]

327; *Massie v. Watts*, 6 Cranch,

³ 129 Mass. 513.

148; *Montpelier v. East Montpelier*,

⁴ *Scott v. Rand*, 118 Mass. 215.

29 Vt. 12; *Leggett v. Hunter*,

⁵ [*Dixon v. Homer*, 12 Cush. 41.]

created, is considered as a judicial decree under which the trustee acts. Although he derives his authority from the will, the will is of no effect until established by proper judicial decree according to the law of the domicile of the testator.¹

306. In Massachusetts, when a vacancy occurs and the instrument creating the trust does not provide for a new appointment, if it is the case of a will, the Probate Court has the appointment of a new trustee; if it be any instrument other than a will, then either the Supreme Court or the Probate Court may appoint.²

307. RESIGNATION. — If a trustee has once accepted the trust, he cannot resign it at his pleasure; he can do so only by leave of the court appointing him.³

308. REMOVAL OF TRUSTEE. — This is a matter always within the discretion of the court, and therefore no positive rule can be laid down as to what will or will not be sufficient cause for removal.⁴ It is, however, safe to say, first, that any wilful misappropriation or improper dealing with the trust funds, or any attempt to make a personal profit out of them, will be cause for removal. The law exacts of a trustee the highest integrity and good faith.⁵

A deliberate and intentional mingling of the trust funds with his own, so as to expose them to the risk of loss, is cause for removal.⁶

Gross neglect to invest the trust funds is cause for removal.⁷

¹ *Jenkins v. Lester*, 131 Mass.

355. In this case the defendant, a resident of Massachusetts, was trustee under a will proved in New York. The court dismissed the bill.

² Pub. Stats. ch. 141, § 5.

³ [*Clay v. Edwards*, 84 Ky. 548; *Chalmer v. Bradley*, 1 J. & W. 51, 68; *Shepherd v. McEvers*, 4 Johns. Ch. 136.]

⁴ [*Piper's Appeal*, 20 Pa. St. 67; *Matthews v. Murchison*, 17 Fed. Rep. 760; *Preston v. Wilcox*, 38 Mich. 578.]

⁵ *Perry on Trusts*, §§ 275-279, and cases cited; *Billings v. Billings*, 110 Mass. 225; [*Fougeray v. Cord*, 50 N. J. Eq. 185; *North Carolina R. R. Co. v. Wilson*, 81 N. C. 223. A trustee will not be removed for a mere mistake of judgment unless it be a gross mistake: *Lathrop v. Smalley's Exr.* 23 N. J. Eq. 192; *In the Matter of Durfee*, 4 R. I. 401.]

⁶ *Sparhawk v. Sparhawk*, 114 Mass. 356; [*Clemens v. Caldwell*, 7 B. Mon. 171, 174.]

⁷ *Cavender v. Cavender*, 114 U. S. 464; [2 *Pomeroy's Eq.* § 1071;

The bankruptcy or insolvency of a trustee is not necessarily a cause for removal. It may or may not be, according to the circumstances. Misfortune may overtake the best man. And therefore, although a trustee becomes bankrupt, yet if his administration of the trust fund has been entirely correct and honest; if he has kept the trust estate perfectly distinct from his own, so that it is unaffected by his private losses; and if the conduct of his own affairs is not open to any suggestion of fraud or dishonesty, — under these circumstances his insolvency will not of itself be cause for removal.¹

If, however, his conduct is in any respect tainted with fraud or dishonesty, it would be the duty of the court to remove him; and so it would be if he showed a reckless disposition or a want of judgment and discretion, although there was no doubt as to his honesty.²

If a trustee becomes improperly hostile to a *cestui que trust*, or personally unkind or offensive, especially if the latter is a woman, or if the amount payable to the *cestui que trust* depends on the discretion of the trustee, the court may remove him, although his honesty is unimpeached.³ So, also, if trustees under a charity are hostile to any scheme

Thompson v. Thompson, 2 B. Mon. 161. So is gross neglect to provide for the beneficiary, although the donor left the amount of such provision to the discretion of the trustee. Babbitt v. Babbitt, 26 N. J. Eq. 44.]

¹ [Shryock v. Waggoner, 28 Pa. St. 430.]

² Perry on Trusts, § 279.

³ Scott v. Rand, 118 Mass. 215; Wilson v. Wilson, 145 Mass. 490; McPherson v. Cox, 96 U. S. 404; [Boaz v. Boaz, 36 Ala. 334. So, where there was a dispute among the several *cestuis que trustent*, it was held sufficient cause for removal that the trustee was confidential clerk to one *cestui*: *In re Mayfield*, 17 Mo. App. 684. So, it is cause

for removal if the trustee resides abroad: Lill v. Neafie, 31 Ill. 101; Dorsey v. Thompson, 37 Md. 25; or where he absconds, Willard v. Eyre, 2 Ves. Jr. 94; where he refuses to account, Ehlen v. Ehlen, 63 Md. 267; where the trustee of church property leaves that church for another: Ross v. Crockett, 14 La. Ann. 811. So, where a personal disqualification arises, as old age, insanity, or drunkenness: Gardner v. Downes, 22 Beav. 395; In the Matter of Wadsworth, 2 Barb. Ch. 381; Bayles v. Staats, 5 N. J. Eq. 513. So, where two trustees become hostile to each other, one or both will be removed: Quackenboss v. Southwick, 41 N. Y. 117.]

adopted by the court for the administration of the charitable fund, this will be sufficient cause for removal.¹

309. As we have seen, a trust is never allowed to fail for want of a trustee.² The court will appoint a new trustee as often as may be necessary, and if there is any delay or difficulty, it will appoint some one temporarily as receiver rather than trustee, to take charge of the trust estate until a proper permanent appointment can be made.

310. THE CONDUCT OF THE TRUSTEE. — The position which the trustee holds is one of trust and confidence,³ and therefore, so far as the honesty and disinterestedness with which its duties must be performed are concerned, no standard can be too exacting. It is a rule based upon the most obvious justice, that a trustee shall not deal with trust property so as to gain any advantage or profit for himself.⁴ He is never allowed, under any circumstances, to use the trust fund for his own advantage.

He can neither sell nor buy the trust estate for himself,⁵ and it is always at the election of the *cestui que trust* to

¹ Attorney-General v. Garrison, 101 Mass. 223.

² [Schouler, Petitioner, 134 Mass. 426. See *supra*, p. 86.]

³ [A trustee cannot delegate his powers, the function being a personal one: Turner v. Corney, 5 Beav. 515; Pearson v. Jamison, 1 McLean, 197; Berger v. Duff, 4 Johns. Ch. 368; Whittelsey v. Hughes, 39 Mo. 13; Thompson v. Finch, 22 Beav. 316. But he may employ an agent when the business requires it: Speight v. Gaunt, L. R. 9 App. Cas. 1; Vanderheyden v. Vanderheyden, 2 Paige, 287.]

⁴ [Webb v. Earl of Shaftesbury, 7 Ves. 480; Bentley v. Craven, 18 Beav. 75; Sloo v. Law, 3 Blatch. C. C. 459; Spindler v. Atkinson, 3 Md. 409; Staats v. Bergen, 17 N. J. Eq. 554; European R. R. Co. v. Poor, 59 Me. 277; Patterson's Appeal, 118 Pa. St. 571; Cald-

well v. Caldwell, 45 Ohio St. 512.]

⁵ [Davoue v. Fanning, 2 Johns. Ch. 252; Brooke v. Berry, 2 Gill, 83; Carson v. Marshall, 37 N. J. Eq. 213; Borders v. Murphy, 125 Ill. 577; Golson v. Dunlap, 73 Cal. 157. He may purchase it for himself, if the *cestui que trust* consents, but such a transaction will be scrutinized very closely by a court of equity: De Caters v. De Chaumont, 3 Paige, 178; Lyon v. Lyon, 8 Ired. Eq. (N. C.) 201; Smith v. Townshend, 27 Md. 368; Coles v. Trecothrick, 9 Ves. 234; Cumberland Coal Co. v. Sherman, 20 Md. 117, 132. But if a trustee makes a *bonâ fide* sale, for a proper consideration, he may at some future time purchase the estate for himself from the grantee: Bush v. Sherman, 80 Ill. 160; Stephens v. Beall, 22 Wall. 329. See *infra*, p. 297.]

avoid any such sale or purchase, provided only that the election is exercised within a reasonable time.¹

311. If the trustee sells and invests the trust funds in another estate, taking the title in his own name, he holds it in trust for his *cestui que trust*. Or the latter, if he prefers, may require the trustee to account for the amount of the purchase-money, allowing him to retain the new estate.²

Such transactions are not void, but voidable at the election of the *cestui que trust*, whenever he has notice of it.³ He may ratify or assent to it, — but he will not be held to have done so, except upon the clearest proof that he was not in any degree misled, deceived, or improperly influenced in his decision.⁴

312. A trustee can make no profit for himself by any sale or use of the trust property.⁵ For instance, if he employs any of it in his private business, then at the election of the *cestui que trust*, he will be made to account for the profits earned; or, if no profits are earned, then for proper interest on the capital employed.⁶

It has even been held that where a trustee was paid a sum to retire by his successor, this sum belonged properly to the trust fund, and he was required to pay it over.⁷

¹ [Thorp v. McCnllum, 6 Ill. 614; Beeson v. Beeson, 9 Pa. St. 279; Hawley v. Cramer, 4 Cow. 717; Foy v. Mackreth, 1 L. C. Eq. (4th Amer. ed.) 188; Morse v. Hill, 136 Mass. 60.]

² [Merket v. Smith, 33 Kans. 66.]

³ [Mitchell v. Dunlap, 10 Ohio, 117; Dodge v. Stevens, 94 N. Y. 209; Harrington v. Brown, 5 Pick. 519. In Bell v. Webb, 2 Gill, 163, the conveyance was set aside twenty years after it was made. A court of equity will not set aside a conveyance at the request of the trustee. Richardson v. Jones, 3 Gill & J. 163.]

⁴ [Knight v. Watts, 26 W. Va. 175; 2 Pomeroy's Eq. § 964. A *cestui que trust* may even plead igno-

rance of his legal rights as ground for setting aside a sale of the trust property which he has ratified: Hoffman Co. v. Cumberland Co. 16 Md. 456, 508.]

⁵ [Schwartz v. Keystone Oil Co. 153 Pa. St. 283, and cases *supra*.]

⁶ [Docker v. Somes, 2 Myl. & K. 655; Utica Ins. Co. v. Lynch, 11 Paige, 520; Blauvelt v. Ackerman, 20 N. J. Eq. 141.]

⁷ Sugden v. Crossland, 3 Sm. & G. 192. [See, also, Archer's Case [1892], 1 Ch. 322; Clark v. Garfield, 8 Allen, 427. A trustee is not justified in lending the trust estate on personal security to the husband or father of the *cestui que trust*: Jones v. Stockett, 2 Bland (Md.), 409.]

313. INVESTMENTS BY TRUSTEES.—Trustees are required to exercise the utmost good faith, and a sound and reasonable judgment and discretion, in the management of the trust estate. A trustee is not required to be a guarantor or warrantor as to investments; but he is bound in making investments to exercise prudence; to avoid apparent or probable risks; to abstain from everything of a speculative nature. He is not responsible for mistakes unless they are the result of carelessness, or of what (in the opinion of the court) was a want of such judgment as a reasonably intelligent and prudent man would exercise in the same circumstances.¹

314. If the instrument creating the trust prescribes what investments the trustee may make, he must rigidly observe the limits thus prescribed.² In the absence of such specific directions, a trustee must follow the rules, if any, prescribed by the laws of the State of the domicile of the trustee.³ But if the laws of the State authorize any investments contrary to the constitution or laws of the United States, such investments will not be upheld. Thus in *Lamar v. Micou*,⁴ an investment by a guardian in confederate bonds was held unlawful, although it was authorized by a law of the State of Alabama, where the guardian was appointed. So, also, in *Horn v. Lockhart*,⁵ an investment by an executor in confederate bonds, pursuant to a statute of the State, and made with the approval of the probate court of the State, was held to be illegal. Where no such positive rules exist, the trustee is left to his own reasonable discretion.⁶

315. The law of England is much more conservative than the rule which commonly obtains in this country as to the class of securities in which trustees may invest trust funds.⁷

¹ [Brown v. Litton, 1 P. Wms. 140; *In re Godfrey*, L. R. 23 Ch. D. 483; *Hun v. Cary*, 82 N. Y. 65; *Cox v. Roome*, 38 N. J. Eq. 259; *Clement v. Clement*, 19 N. H. 460; *Norwood v. Harness*, 98 Ind. 134.]

² [Denikie v. Harris, 84 N. Y. 89. Even if a general discretion be given, it must be exercised with prudence: *Bethell v. Abraham*, L. R. 17 Eq. 24.]

³ [Or by the order of the court, *Latimer v. Hanson*, 1 Bland, 51.]

⁴ 112 U. S. 452.

⁵ 17 Wall. 570.

⁶ [Kimball v. Reding, 31 N. H. 352.]

⁷ [2 Pomeroy's Eq. § 1074. This discretion has been enlarged by recent statutes, 22 & 23 Vict. ch. 35; 52 & 53 Vict. ch. 32.]

The English practice is stated in Perry on Trusts (§ 455). The American doctrine, so far as there can be said to be one, is stated and the cases are reviewed by Mr. Justice Gray, in *Lamar v. Micou*.¹

316. The Massachusetts rule was laid down more than fifty years ago in *Harvard College v. Amory*,² and it has repeatedly been cited and approved in successive cases down to *Hunt, Appellant*,³ where it is said: "All that can be required of a trustee to invest is that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion, and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of the capital to be invested." Under this rule, investments in the stock of manufacturing, insurance, and railroad companies in good standing, in bonds and mortgages, and in railroad bonds secured by mortgage, have been approved.⁴

In *Hunt, Appellant, supra*, a very questionable investment was upheld by a majority of the court. But nothing really speculative can be approved.⁵ In *Trull v. Trull*,⁶ it was held that investing in a patent and in the business of manufacturing under it was improper.

317. A trustee is not liable for depreciation in real estate. His duty is to invest fairly as between the life tenant and remainderman.⁷

318. As to delay in collecting debts, see *In re Brogden*.⁸

¹ 112 U. S. 452; s. c. 114 U. S. 218.

² 9 Pick. 446, 461.

³ 141 Mass. 515.

⁴ *Harvard College v. Amory*, 9 Pick. 446; *Brown v. French*, 125 Mass. 410; *Bowker v. Pierce*, 130 Mass. 262; [*Nicholls, Appellant*, 157 Mass. 20. The rule is more strict in most of the States: *King v. Talbot*, 40 N. Y. 76; *Ormiston v. Olecott*, 84 N. Y. 339; *Tuttle v. Gilmore*, 36 N. J. Eq. 617; *Judge of Probate v. Mathes*, 60 N. H. 433.]

⁵ [*Smethurst v. Hastings*, L. R. 30 Ch. D. 490; *Mattocks v. Moulton*, 84 Me. 545.]

⁶ 13 Allen, 407.

⁷ *In re Whitely*, L. R. 33 Ch. D. 347; [*State v. Robinson*, 57 Md. 486, 495; *Moseley v. Marshall*, 22 N. Y. 200.]

⁸ L. R. 38 Ch. D. 546; [*Harrington v. Keteltas*, 92 N. Y. 40; *In the Matter of Cornell*, 110 N. Y. 351; *Will's Appeal*, 22 Pa. St. 325.]

319. **DELAY IN MAKING INVESTMENTS.** — If a trustee negligently allows the trust funds to remain uninvested, he will be chargeable not only with interest on the funds, but for such other loss as may be attributable to his delay.¹ Thus where a trustee allowed funds to remain on deposit in a bank for an unreasonable time, and the bank failed, so that the fund was lost, the trustee was charged with it.² From the nature of the case, no definite rule can be laid down as to what amounts to unreasonable delay. In this question and in all kindred questions of degree, — as, what is reasonable notice, or care, or diligence, — the inquiry is a mixed question of law and fact, depending for solution upon its own particular circumstances. The general rule is easily enough stated, that the trustee must act with the diligence which a prudent man would exercise in his own affairs under the same circumstances.³

320. **LIABILITY BY MINGLING TRUST FUNDS WITH HIS OWN.** — It is one of the primary duties of a trustee to keep the funds of the trust separate from his private funds, and not, by mingling them, to expose the trust funds to the risks to which his own property may become liable.⁴

If, therefore, a trustee deposits trust funds with his own in a bank, and the bank fails, he is liable for the loss, although the bank was in good credit.⁵ By thus mixing the funds the identity of the trust funds is lost; it is in effect an appropriation by the trustee of those funds, and thereupon and thereafter he becomes a debtor to the trust estate for their amount. Nothing but the payment of that debt will discharge his obligation, and therefore it is immaterial

¹ [Lent v. Howard, 89 N. Y. 169; Armstrong v. Miller, 6 Ohio, 118; Turney v. Williams, 7 Yerg. 172.]

² Barney v. Saunders, 16 How. 535.

³ [Norwood v. Harness, 98 Ind. 134; Field v. Pecket, 29 Beav. 576; Miller v. Proctor, 20 Ohio St. 442; Carpenter v. Carpenter, 12 R. I. 544; Waring v. Darnall, 10 Gill & J. 126.]

⁴ Sparhawk v. Sparhawk, 114 Mass. 356; [Utica Insurance Co. v. Lynch, 11 Paige, 520; Knowlton v. Bradley, 17 N. H. 458.]

⁵ [McAllister v. Commonwealth, 30 Pa. St. 536; Webster v. Pierce, 35 Ill. 158; Shaw v. Bauman, 34 Ohio St. 25; Mason v. Whitthorne, 2 Coldw. (Tenn.) 242.]

to the trust estate, upon this question of liability, whether the bank which the trustee has made his depository fails or does not fail.¹

321. Does this liability necessarily follow where a trustee has deposited trust funds in his own name, but in a bank distinct from that where his private funds are deposited? In Perry on Trusts (§ 463), it is stated that personal liability results from such a form of deposit,² but the cases cited do not quite cover the point, nor do I know of any case which does. In *Pennell v. Deffell*³ the Lords Justices suggested that such a form of deposit might be a breach of trust. This, although *obiter dictum*, was certainly getting very near to it, for if depositing in this form is of itself a breach of trust, then of course the trustee would be liable personally, should a loss occur by the failure of the bank.

I think it clear that such a form of deposit makes, and should make, a trustee *primâ facie* liable.

One main reason why a deposit by a trustee in his own name should make him personally responsible is, that by such a form of deposit he exposes the fund to any lien, or set-off, or counter claim which the bank may have against him personally, if it is not notified that the deposit consists of trust funds; and possibly also he exposes the trust fund to attachment by other creditors.⁴

If, however, a trustee has deposited trust funds in a bank other than that in which he deposits his private funds, with a view to keeping them entirely distinct and not with any intent to appropriate them to his own use, and their identity has in fact been preserved, then the *primâ facie* presumption is rebutted, and he should not, I think, be held responsible for their loss by the failure of the bank, merely because the deposit was in his own name and not as trustee.

¹ 1 Hill on Trustees, p. 376; Massey v. Banner, 1 J. & W. 241.

² [See also Naltner v. Dolan, 108 Ind. 500; Williams v. Williams, 55 Wis. 300; Jenkin v. Walter, 8 Gill & J. 218.]

³ 4 De G., McN. & G. 372, 383, 390.

⁴ [Jackson v. The Bank of U. S. 10 Pa. St. 61; Greenfield School District v. First National Bank, 102 Mass. 174; Farmers' Bank v. King, 57 Pa. St. 202.]

322. THE TRUSTEE'S POWER TO SELL. — In most instruments creating trusts, the trustees are authorized to change investments and to sell for that purpose.¹ Has a trustee, in the absence of express authority, power to sell? Some difference of opinion exists upon this point, but the rule commonly accepted is that a trustee has not such power. A wide distinction exists between a trustee and an executor, and we must not be misled by a supposed analogy between them. The latter is appointed to close up the testator's estate, and he has the implied power to sell the personal estate.² But this presumption does not apply to a trustee. In England the power and discretion of a trustee are very strictly limited. In *Shaw v. Spencer*³ the court declined to pass upon this question, saying: "It is to be borne in mind that the question under discussion is not whether one holding stock as trustee may sell it in the market and pass a good title to the purchaser. We do not intimate that this cannot be done." But, notwithstanding this hesitancy, certainly the drift of the cases is to the effect that the power to sell is not inherent in the office of a trustee, and that whoever knowingly takes a title from a trustee takes it at his risk.

323. The safer conclusions to be drawn from the cases are these: (a) In the absence of express authority, a trustee may sell so as to convey the legal title. The purchaser takes the legal title, which is good against all the world, except the *cestui que trust*.⁴

In *Boursot v. Savage*⁵ one of three trustees executed a deed of assignment of a lease held by the three, signing his own name and forging the other two names. The Vice-Chancellor said: "I think the effect of this deed of assignment was to vest the legal title-interest of one third of the

¹ [The directions of the instrument must be followed strictly: 13 Met. 421; *Carter v. Nat. Bank of Lewiston*, 71 Me. 448.]

Kissam v. Dierkes, 49 N. Y. 602;

Hutt v. Townshend, 31 Md. 336;

Alley v. Lawrence, 12 Gray, 373.]

² [*Scott v. Tyler*, 2 Dickens, 712,

725; *Field v. Schieffelin*, 7 Johns.

Ch. 150; *Hutchins v. State Bank*,

³ 100 Mass. 382, 394.

⁴ *Manahan v. Varnum*, 11 Gray, 405; *Cowell v. Springs Co.* 100 U. S. 55.

⁵ L. R. 2 Eq. 134, 140.

leasehold property in the defendant ; ” but inasmuch as the defendant had constructive notice of the trust, he took the one third subject to the trust, and therefore he derived no beneficial interest from the deed.

324. (b) But without express authority a trustee cannot sell either real or personal estate so as to convey the property discharged of the trust.¹ Whoever knowingly buys from a trustee buys subject to any trust upon which the property is held, and subject to the claims of the *cestui que trust* therefor.²

325. THE LEGAL TITLE OF THE TRUSTEE. — The legal title to the trust property is in the trustee exclusively.³ The consequence of this is, that all suits relating to or depending upon the legal title must be brought by or against him.⁴

If the trust property be real estate, any suit at law to recover the land itself or damages for any trespass thereon ; or if the trust property be personal property, any suit for its conversion or for injury to it, must be brought by the trustee in his name alone, and it would be error to join the *cestui que trust* as a party plaintiff. So, too, where the instrument creating the trust authorizes the trustee to represent the beneficial interest of the *cestui que trust*, as well as the legal title, in all controversies with third persons, there the suit may be by or against the trustee alone, whether at law or in equity, without joining the beneficiaries.⁵ This principle is especially applicable to bonds under railroad mortgages held by trustees.

326. But, as a general rule, in all cases relating to the

¹ [But authority to sell need not be given in terms ; it may be implied by the tenor of the instrument creating the trust : *Cherry v. Greene*, 115 Ill. 591 ; *Going v. Emery*, 16 Pick. 107 ; *Stall v. Cincinnati*, 16 Ohio St. 169.]

² *Loring v. Salisbury Mills*, 125 Mass. 138, 150 ; [Third Nat. Bank v. Lange, 51 Md. 138. See, also, *supra*, p. 158.]

³ [*Trinity College v. Brown*, 1 Vernon, 441 ; *Reece v. Allen*, 10 Ill. 236.]

⁴ [*First Baptist Society v. Hazen*, 100 Mass. 322 ; *Cox v. Walker*, 26 Me. 504 ; *Beach v. Beach*, 14 Vt. 28 ; *Western R. R. Co. v. Nolan*, 48 N. Y. 513 ; *Porter v. Raymond*, 53 N. H. 519.]

⁵ *Kerrison v. Stewart*, 93 U. S. 155, 160.

equitable interest, — as to whom it belongs, how it is to be apportioned, etc., — as well as in all controversies between the beneficiaries and the trustees, all the beneficiaries are necessary parties, and must be joined, either as plaintiffs or defendants; and the remedy in all these cases is exclusively in equity.

327. The trustee alone is personally liable for all contracts made by him in his capacity as trustee, and the *cestui que trust* is never personally liable therefor, either at law or in equity.¹

The trustee is not an agent but a principal. He is not the agent of the *cestui que trust*, but he is himself the principal so far as the legal title and estate are concerned.

“When a trustee contracts as such, unless he is bound, no one is bound, for he has no principal. The trust estate cannot promise; the contract is therefore the personal undertaking of the trustee. . . . If a trustee contracting for the benefit of a trust wants to protect himself from individual liability on the contract, he must stipulate that he is not to be personally responsible, but that the other party is to look solely to the trust estate.”²

328. It is hardly necessary to add, that although the trustee is thus personally liable for contracts made by him in his capacity as trustee, yet if these contracts were necessary and proper in the administration of the trust, he will have the right to charge them in his account and thus be reimbursed for them.³

329. ADVICE OF THE COURT. — Whenever a question arises as to the power or duty of a trustee in a given case, he has the right to apply to a court of equity for instructions. This is a very common practice, and it is well settled

¹ [Gill v. Carmine, 55 Md. 339; Hackman v. Maguire, 20 Mo. App. 286. But under some circumstances the trustee has power to charge the estate: New v. Nicoll, 73 N. Y. 127.]

² Taylor v. Davis, 110 U. S. 330. See, also, Everett v. Drew, 129 Mass. 150.

³ Treadwell v. Cordis, 5 Gray, 341; Putnam v. Collamore, 109 Mass. 509; Hyde v. Wason, 131 Mass. 450; [Wiswell v. First Cong. Church, 14 Ohio St. 31; Crosby v. Mason, 32 Conn. 482; Tillinghast v. Daily, 7 R. I. 383; Kearney v. Maccomb, 16 N. J. Eq. 189; Goodhue v. Clark, 37 N. H. 525.]

But this advice will not be given as to past transactions of a trustee.¹

Nor will it be given as to matters which were left by the testator to the discretion of the trustee. In these matters the court will not interfere except upon proof that his discretion is being exercised dishonestly.² Cases for the court arise most often when the construction of the will or other instrument under which the trustees are acting is doubtful.

330. COMPENSATION. — In this country trustees are almost universally allowed a reasonable compensation for their services.³ In England it is, or was, otherwise.⁴ In Massachusetts it is now expressly provided by statute that trustees as well as executors, administrators, and guardians "shall have such compensation as the court in which their accounts are settled may deem just and reasonable."⁵ This compensation is commonly a commission of five per cent. on the annual income.

331. If a trustee be guilty of waste or of misconduct, the court will punish him by withholding the commissions or by applying them to repair the loss occasioned by his misconduct.⁶

332. JOINT TRUSTEES. — A few points remain to be noted where there are two or more trustees. All the trustees should join in every case of transfer of property, real or personal, because their title is strictly a joint title; they are, so to say, joint tenants of the legal title.⁷

¹ *Sohier v. Burr*, 127 Mass. 221.

² *Proctor v. Heyer*, 122 Mass. 525, 529; *Amory v. Green*, 13 Allen, 413.

³ [*Barrell v. Joy*, 16 Mass. 221, 228; *Clark v. Platt*, 30 Conn. 282; *Montgomery's Appeal*, 86 Pa. St. 230; *Pitney v. Everson*, 42 N. J. Eq. 361. *Contra*, *Constant v. Matteson*, 22 Ill. 546; *Egbert v. Brooks*, 3 Har. (Del.) 110; *Green v. Winter*, 1 Johns. Ch. 26.]

⁴ [*Robinson v. Pette*, 3 P. Wms.

249; *Bonithon v. Hockmore*, 1 Vernon, 316.]

⁵ Public Statutes, ch. 144, § 7. [In most of the States the compensation of trustees is regulated by statute, 2 Perry on Trusts, § 918.]

⁶ *Walker v. Walker*, 9 Wall. 743; *Belknap v. Belknap*, 5 Allen, 468; [*Peers v. Ceeley*, 15 Beav. 209; *Gilbert v. Sutliff*, 3 Ohio St. 129.]

⁷ [*Sinclair v. Jackson*, 8 Cowen, 543; *Ham v. Ham*, 58 N. H. 70.

One or more of the trustees may receive and receipt for dividends or other money paid.¹ It is or has been usual to require all the trustees to sign receipts for money, with the erroneous idea that this is necessary. When payment is in fact made to one of two trustees, and the other has also signed the receipt, but merely "for conformity," he is not responsible for the money if the other misappropriates it without his fault or connivance.²

333. When two trustees are originally appointed, and one dies or resigns, the survivor ordinarily can act thereafter alone.³ If, however, the instrument creating the trust requires that there shall always be two or more trustees, then the surviving trustee cannot act alone, — except so far as it may be necessary to preserve the property, and except so far as acts merely ministerial, such as the receipt and payment of income, are concerned. He should not undertake to proceed alone in any matter involving judgment, — such as the sale or purchase of property.

334. As a rule, one trustee is not responsible for the misdoings or misappropriations of a co-trustee, unless he participated in or connived at the wrong, or could have prevented it by the exercise of reasonable diligence and care.⁴

In every phase of his relations toward the trust, every trustee is bound to exercise reasonable attention and pru-

See, also, *Smith v. Wildman*, 37 Conn. 384.]

¹ [*Contra*, *Vandever's Appeal*, 8 Watts & S. 405; *Fesmire v. Shannon*, 143 Pa. St. 201; *Stowe v. Bowen*, 99 Mass. 194; *Kip v. Denton*, 4 Johns. 23; *Latrobe v. Tierman*, 2 Md. (Ch.) 474; *Walker v. Symonds*, 3 Swans. 1, 63; *Crewe v. Dicken*, 4 Ves. 97.]

² [But his signature is *prima facie* evidence that he received the money: *Brice v. Stokes*, 11 Ves. 319; *Monell v. Monell*, 5 Johns. Ch. 283, 294; *Deaderick v. Cantrell*, 10 Yerg. 263.]

³ [*Lane v. Debenham*, 11 Hare, 188; *Stewart v. Pettus*, 10 Mo. 755;

Shook v. Shook, 19 Barb. 653. A mere direction as to how a trustee shall be appointed in case a vacancy occurs is not a requirement that the vacancy be filled: *Belmont v. O'Brien*, 12 N. Y. 394; *Warburton v. Sandys*, 14 Sim. 622.]

⁴ *McKim v. Aulbach*, 130 Mass. 481; [*Paulding v. Sharkey*, 88 N. Y. 432; *Townley v. Sherborne*, Bridg. 35; *English v. Newell*, 42 N. J. Eq. 76; *State v. Guilford*, 18 Ohio, 500; *Irwin's Appeal*, 35 Pa. St. 294. As to the liability of a president or director for failure to attend meetings of the directors, see *Marquis of Bute's Case* [1892], 2 Ch. 100.]

dence. And therefore although one trustee may be perfectly honest, yet if he has allowed a co-trustee to have the sole control of the funds, or has given him in any other way an opportunity to misapply or squander them, under such circumstances that his suspicions ought to have been aroused, his negligence will render him liable for the loss.¹ It is always a question of fact, depending upon the peculiar circumstances of the particular case.

335. A trust will be terminated by order of the court, where the *cestui que trust* has a remainder of the principal, and the trust is merely to pay him the income of part during his life.²

Cestuis Que Trustent.

336. The remedy of a *cestui que trust*, whether against the trustee or third persons, is always in equity.³ This is necessarily so, because his title is merely an equitable title of which a court of law cannot take cognizance. There can be no suit at law, therefore, against the trustee for an account, or for any breach of trust.⁴

337. By parity of reasoning the same thing is true of all suits against third persons who by collusion with the trustee, or otherwise, have acquired unlawfully any of the trust estate. The remedy of the *cestui que trust* against them is solely in equity.

This remedy is twofold. First, If the property is still in the hands of a person who has acquired it with notice of the trust, the court will hold the property to be charged with the trust in favor of the true beneficiary, and will require the wrongful holder either to reconvey the property, or to account for its value, as the *cestui que trust* may elect.⁵

¹ [Langford v. Gascogne, 11 Ves. Peters, 166; Sparhawk v. Buell, 9 333; Croft v. Williams, 88 N. Y. Vt. 41.]

384; Richards v. Seal, 2 Del. Ch. ² Sears v. Choate, 146 Mass. 395.

266; Pim v. Downing, 11 S. & R. ³ [See 2 Pomeroy's Eq. § 979, and 1 Spence's Eq. 445.]

66; Glenn v. McKim, 3 Gill, 366. ⁴ Hill on Trustees, 518, note 1; Davis v. Coburn, 128 Mass. 377; [Upham v. Draper, 157 Mass. 292.]

But it is negligence for a trustee to pay over to his co-trustee funds which he has collected. He must personally see to the application of them: Edmonds v. Crenshaw, 14 ⁵ Oliver v. Piatt, 3 How. 333, 401;

Or, secondly, if the wrongdoer has disposed of the property to some innocent purchaser without notice, equity will then require him to account for the value of the property, and for all profits which he has made by the sale of it.¹

338. THE STATUTE OF LIMITATIONS. — An important question is, to what extent are trusts and trustees affected by the statute of limitations, or by the lapse of time. Here a marked distinction exists between express trusts, *i. e.* trusts created by the parties, and implied, *i. e.* resulting or constructive trusts.

As to express trusts, it is well settled that the statute of limitations does not apply, and no lapse of time bars the right of the *cestui que trust*. So long as the relation subsists, the possession of the trustee (as it is said) is deemed to be the possession of his *cestui que trust*. His possession of the trust property is not therefore adverse to the right of the *cestui que trust*, and his duty to account is upon the same principle continuous.²

339. So long as the trust is executory, and the trustee continues to act, his liability to account also continues, and it is only after a final accounting, or a refusal to render such account, that the statute of limitations begins to run in his favor.³

340. But when a trustee unequivocally repudiates the relation of trust, and claims to hold the property as his own, and such repudiation and claim are brought to the knowledge of the *cestui que trust*, the statute of limitations

[Phillips v. Crammond, 2 Wash. C. 441; Breit v. Yeaton, 101 Ill. 242; Perkins v. Perkins, 134 Mass. 441; Marshall v. Carson, 38 N. J. Eq. 250. These remedies are alternative, not concurrent: Hodges v. Bullock, 15 R. I. 592.]

¹ [Freeman v. Cook, 6 Ired. Eq. (N. C.) 373, 379; Norman v. Cunningham, 5 Gratt. (Va.) 63; Bradley v. Luce, 99 Ill. 234; Feamster v. Feamster, 35 W. Va. 1.]

² Lewis v. Hawkins, 23 Wall. 119, 126, and cases; Speidel v. Hen-

rici, 120 U. S. 377; Oliver v. Piatt, 3 How. 333, 411; [Haskell v. Hervey, 74 Me. 192; Whetstone v. Whetstone, 75 Ala. 495; C. & E. Illinois R. R. Co. v. Hay, 119 Ill. 493; Janes v. Throckmorton, 57 Cal. 368; Williams v. Williams, 82 Wis. 393.]

³ United States Bank v. Beverly, 1 How. 134, 151; Davis v. Coburn, 128 Mass. 377; [Attorney-General v. Brewers' Co. 1 Mer. 495; McCarthy v. McCarthy, 74 Ala. 546; Sollee v. Croft, 7 Rich. Eq. 34.]

begins to run from the time of such knowledge by the beneficiary.¹

341. So, also, when a trustee in good faith terminates his relation to the property, asserting no control over it, and no longer claiming or exercising any authority under the trust, the statute of limitations begins to operate in his favor.²

342. So where a trustee, not recognizing the trust, conveys real estate by an absolute deed, under which the vendee enters and occupies, the statute of limitations thereupon begins to run in favor of the vendee. The obvious reason is that the vendee's possession is under a claim of title adverse both to the trustee and to the *cestui que trust*; and continuous possession for twenty years will bar all claims both of trustee and *cestui que trust*.³

343. THE RULE AS TO IMPLIED TRUSTS is quite different from that which applies to express trusts, and with very good reason. The possession of one whom the law has converted into a trustee on account of his fraud, or because, under the circumstances or relations of the parties, another has some equitable claim to the same property, is at the outset confessedly adverse to that of the equitable owner. It is because he is enjoying what he ought not to have that equity converts him into a trustee. His possession therefore does not imply any recognition of the equitable claim, but is in defiance thereof. It is adverse in the most intense sense, and

¹ Speidel v. Henrici, 120 U. S. 377; Philippi v. Philippe, 115 U. S. 151; Davis v. Coburn, 128 Mass. 377; Jones v. McDermott, 114 Mass. 400; [Riddle v. Whitehill, 135 U. S. 621; University v. The Bank, 96 N. C. 280; Needles v. Martin, 33 Md. 609, 619; Hubbell v. Medberry, 53 N. Y. 98; Thomas v. Merry, 113 Ind. 83.]

² Clarke v. Boorman, 18 Wall. 493, 509; [Miller v. Morrison, 22 S. C. 590; Bacon v. Rives, 106 U. S. 99; Wilmerding v. Russ, 33 Conn. 67.]

³ Merriam v. Hassam, 14 Allen, 516; [Melling v. Leak, 32 Eng. L. & Eq. 442; Williams v. 1st Pres. Society, 1 Ohio St. 478; Johnson v. Prairie, 91 N. C. 159; McCoy v. Poor, 56 Md. 197. So, also, where the trustee devises the estate, as if it were his own, and his devisees enjoy it for twenty years: Stonehill v. Swartz, 129 Ind. 310. Not so, where, upon the trustee's death intestate, his heirs enter upon the trust estate and enjoy it for twenty years: Russell v. Peyton, 4 Brad. (Ill.) 473.]

consequently the statute of limitations ordinarily begins to run at once against the equitable owner, because his duty to assert his equitable right then begins. If, owing to the fraud and concealment of the other party, he has not been informed of his rights, then the bar of the statute does not begin to run until he has discovered or ought to have discovered them.¹

¹ *Boone v. Chiles*, 10 Peters, 177, 223. [See, generally, *Kane v. Bloodgood*, 7 Johns. Ch. 90; *Weaver v. Leiman*, 52 Md. 708; *Howell v. Howell*, 15 Wis. 55; *Haynie v. Hall*, 5 Humph. 290; *McClane v. Shephard*, 21 N. J. Eq. 76. But even in case of implied trust, "where the trustee has at all times admitted the right of the *cestui que trust*, his possession is not adverse, and the statute does not run against the *cestui que trust*:" *Corr's Appeal*, 62 Conn. 403; *Dow v. Jewell*, 18 N. H. 340; *Springer v. Springer*, 114 Ill. 550.]

CHAPTER XIV.

CHARITIES.

344. GIFTS in trust for charitable purposes are a class of trusts over which the jurisdiction in equity is ancient and well settled.

The origin of this jurisdiction was at one time a vexed question, for it was disputed whether the jurisdiction was inherent in the Court of Chancery, or was established for the first time in 1601, by the famous statute, 43 Eliz. c. 4, commonly called the Statute of Charitable Uses. Historical research, however, has settled it beyond a doubt that long before the statute of Elizabeth, the Court of Chancery frequently dealt with this class of trusts, in the exercise of its regular jurisdiction, and that the main purpose and effect of the statute were to ordain what should constitute thereafter, in the eye of the law, a charitable use.¹

345. In Massachusetts, and presumably in all other States where there is no express legislation to the contrary, this statute constitutes a part of the law of the land, inherited from the mother country. In those States (if any there be) where this statute is held not to be adopted, their courts of equity must be remitted to the original jurisdiction which courts of chancery exercised in England before the statute was enacted.²

¹ [Burr v. Smith, 7 Vt. 241.]

² [In certain States this statute is not recognized, but it is held that a court of equity has jurisdiction over charitable uses without the aid of the statute : Witman v. Lex, 17 S. & R. 88 ; Tappan v. Deblois, 45 Me. 122 ; Howe v. Wilson, 91 Mo. 45.

In certain other States neither

the statute nor the inherent jurisdiction over charitable uses are recognized. Hence, in these States, public charities are on the same basis as private trusts, *i. e.*, they require a definite beneficiary, and must not contravene the rule against perpetuities or the rule against accumulations : Tilden v. Green, 130 N. Y. 29 ; Dashiel v. Attorney-Gen-

346. The distinction between a public charity and the private trusts which we have been considering is marked and important. The statute of Elizabeth defines what is a charitable use in these terms : —

“Relief of aged, impotent, and poor people: maintenance of sick and maimed soldiers and mariners; schools of learning, free schools, and scholars in universities; repairs of bridges, ports, havens, causeways, churches, sea-banks, and highways; education and preferment of orphans; relief, stock, or maintenance for houses of correction; marriages of poor maids; supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed; relief or redemption of prisoners or captives; aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers, and other taxes.”¹

347. In construing this statute so far as it defines what is a charitable object, the most liberal view has been adopted. The courts have never felt bound to confine themselves to the particular instances named, but have held that this enumeration indicated, rather by way of illustration than of enumeration, the different classes of objects which are “charitable” within the purview of the law.

In *Jackson v. Phillips*² the court say: “It is well settled that any purpose is charitable in the legal sense of the word which is within the principle and reason of this statute, although not expressly named in it; and many objects have been upheld as charities which the statute neither mentions nor distinctly refers to.”³

The only reference in the statute to the promotion of piety or religion, as one of its objects, is in the clause for the “repairs of bridges, ports, . . . churches, sea-banks, and highways.” And yet no court has ever hesitated to hold that gifts to promote the diffusion of Christianity and religion among mankind are within the statute, and gifts having

eral, 5 Har. & J. 392; Atwater v. Russell, 49 Minn. 57. For the law of the different States on this point, see 2 Pomeroy's Eq. § 1029; 2 Perry on Trusts, § 748.]

¹ 2 Perry on Trusts, § 692; 2 Story's Equity (13th ed.), § 1160.

² 14 Allen, 539, 551.

³ See *Drury v. Natick*, 10 Allen, 169, for a notable instance of this liberal construction.

these ends in view have been supported in an almost innumerable variety of cases, as proper charitable uses.¹

348. To recur to the statute, the objects which it declares to be charitable may be classified thus : —

(1) The alleviation of all forms of infirmity and suffering ;² (2) the care of orphans, the relief of the poor and of all prisoners and captives ;³ (3) the promotion of religion and learning ;⁴ (4) the promotion of public works of improvement, and lightening the burdens of taxation ;⁵ assisting young tradesmen, mechanics, and poor maidens.⁶

It would be tedious and unprofitable, even if it were practicable, to state in detail all the cases which have been held to come under one or another of these heads of charitable uses. But having these main divisions in mind, I shall endeavor to outline some general features by which it may be determined whether or not a particular case falls within the statute.

349. And, first, it is an essential characteristic of a charitable gift, in the legal sense, that it should be public in its nature, and that the persons to be benefitted should be indefinite.⁷

A charity was thus defined by Judge Gray, in *Jackson v. Phillips* :⁸ " A charity in the legal sense may be more fully defined as a gift to be applied consistently with exist-

¹ Many of these cases are collected in 2 Perry on Trusts, § 701. See, also, *Jackson v. Phillips*, 14 Allen, 539.

² [Mayor of London's Case, Duke on Uses, 380.]

³ [Attorney-General v. Comber, 2 Sim. & S. 93.]

⁴ [Tainter v. Clark, 5 Allen, 66 ; Andrews v. Andrews, 110 Ill. 223 ; Sweeney v. Sampson, 5 Ind. 465 ; Clement v. Hyde, 50 Vt. 716.]

⁵ [Coggeshall v. Pelton, 7 Johns. Ch. 292 ; Hamden v. Rice, 24 Conn. 350 ; Cresson's Appeal, 30 Pa. St. 437 ; Magill v. Brown, Brightly,

411 ; Nightingale v. Goulburn, 5 Hare, 484.]

⁶ [Attorney-General v. Ironmongers' Co. 2 Myl. & K. 576 ; Attorney-General v. Painters' Co. 2 Cox, 51 ; Cresson's Appeal, 30 Pa. St. 437.]

⁷ [Carne v. Long, 2 De G., F. & J. 75 ; Stratton v. Physico-Medical College, 149 Mass. 505 ; Hunt v. Fowler, 121 Ill. 269 ; Russell v. Allen, 107 U. S. 163, 167 ; State of Delaware v. Griffith, 2 Del. Ch. 392.]

⁸ 14 Allen, at p. 556. The definition is quoted in 2 Perry on Trusts, § 697, as being perfect.

ing laws for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting and maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature."

When it is said that the persons to be benefitted must be indefinite, it is meant that they must be uncertain and indefinite in the sense that they are not personally selected or pointed out by the donor; they must remain uncertain and indefinite until they are selected or appointed by the trustees or administrators of the charity to be the particular beneficiaries of the trust for the time being. If a testator makes a gift to or for the benefit of specific persons as the children of A, B, or C, that is simply a private gift or trust, and has no element of a charity. If, however, he makes a gift for the education of six poor scholars to be selected from time to time by the trustees of the charity (or in any other way), that is a good charity. The persons are indefinite so far as the testator is concerned.

350. But the fact that the number of persons to be benefitted is limited and certain does not affect the validity of the gift. The donor may limit the number of persons who, through all time, are to be the subjects of his bounty, whether he establishes an orphanage, an asylum, a hospital, or school, or a certain number of scholarships. The beneficiaries themselves are uncertain, until they are selected in the manner which he may have directed.

I trust, therefore, it is not hypercritical to point out that the definition of a charity, which I have just quoted, contains in its first line a serious error, in requiring that a charity must be for the benefit of an "indefinite number of persons." The actual persons to take must be indefinite, — their number may be definite, and it may be fixed by the donor.

351. The donor, however, may limit his gift to a certain

designated class of persons, without contravening the rule just stated.¹ Thus, a charity may be for the benefit of the poor of a certain parish, or district, or town. In *Attorney-General v. Old South Society*² the gift was to the poor of a particular parish, and it was held to be good. A fund for the support of a perpetual curate in a particular parish and other similar gifts have been held valid as charities.³

352. But a gift, although for religious uses alone, is not a charity if it be made to or for the benefit of a definite body, ascertained or ascertainable, who are to receive, control, and enjoy its benefits. Thus a gift to trustees in perpetuity, for the benefit of a certain church or parish, is not a charity, although the uses to which it is to be applied are strictly religious, — as the support of its ministry or the erection or preservation of the “meeting-house.” In *Old South Society v. Crocker*,⁴ the gift was to certain persons named, and their associates and successors, for the erection of a house for the public worship of God, and for the erection of a dwelling-house for the minister “admitted as pastor.” The court said: “Where there is a body or a definite number of persons ascertained or ascertainable, clearly pointed out by the terms of the gift to receive, control, and enjoy its benefits, it is not a public charity, however carefully and exclusively the trust may be restricted to religious uses alone.”

353. A religious parish or society may be made the almoner of the donor's bounty, as where a gift is made to the poor of a certain parish, to be selected from time to time by its officers, and that is a good public charity.

But if the gift is to, or for, the benefit of the parish itself, that is a private gift. Such a gift is good as a private trust, and will be upheld and protected as such.

Nor is such a gift or devise contrary to the rule of law prohibiting perpetuities which prevent alienation. “Be-

¹ [Howard v. American Peace Society, 49 Me. 288; Chambers v. City of St. Louis, 29 Mo. 543; Prickett v. The People, 88 Ill. 115; Wright v. Linn, 9 Pa. St. 433.]

² 13 Allen, 474.

³ Attorney-General v. Parker, 1 Ves. Sr. 43; Attorney-General v. Newcombe, 14 Ves. 1.

⁴ 119 Mass. 1. See, also, Attorney-General v. Federal Street Society, 3 Gray, 1, 45.

cause the entire interest at any time is represented by known persons living, to wit: the legal estate by the trustees, there being always power in the court, in case of necessity, to supply trustees in whom the estate will vest, the equitable interest by those persons who then constitute the body of the associates or the society, who may be ascertained according to its rules governing membership.”¹

Thus, there is no period when the estate is not alienable. But the fund, in whatever new form it may be, is still impressed with the original trust, and cannot be perverted to any other object without the consent of all the beneficiaries. If they, however, with the trustees, agree in such perversion, there is no one to complain, unless the estate was given upon condition, in which case the original donor or his heirs will have a right of entry.

354. POOR RELATIONS. — In this connection an interesting question arises as to how far a gift in trust for “poor relations” is a good charitable use.

In *Isaac v. Defriez*² the testator made a gift to trustees, the annual interest of which was to be paid “to one poor relation of his own, either male or female, for a portion in way of marriage, or putting him or her out in life;” and a like sum was given in like manner to one poor relation of his wife. This was held to be a good charitable use.

In *White v. White*³ there was a bequest to trustees of a fund for putting out “our poor relations” as apprentices; and this, also, was held good as a charity.

In *Attorney-General v. Price*⁴ the bequest was to trustees; that they “shall forever divide and distribute, according to his and their discretion, amongst my poor kinsmen and kinswomen, and amongst their offspring and issue which shall dwell within the county of Brecon, the sum of twenty pounds by the year, without fraud and collusion.” This, again, was upheld as a good charity.

In *Mahon v. Savage*⁵ there was a bequest in trust “to be

¹ *Old South Society v. Crocker*, 119 Mass. 1, 23. [See, also, *Fadness v. Braunborg*, 73 Wis. 257, 280.]

² *Ambler*, 595.

³ 7 Ves. 423.

⁴ 17 Ves. 371.

⁵ 1 Sch. & Lef. 111.

distributed amongst my poor relations, or such other objects of charity as shall be mentioned in my private instructions to my executors." This was held good as a charity.¹

In *Swasey v. American Bible Society*² a bequest to trustees of a fund "for the benefit of the poor and needy of my relatives" was held good as a charity.

355. Another qualification or exception to the general rule requiring that the beneficiaries must be indefinite is this: The statute declares several objects to be charitable where, in order that the charity should be available or practicable, the beneficiary must be pointed out by the donor. In these cases the character of the gift as a public charity consists in the nature of the purposes to which it is to be applied, rather than in the indefinite character of the donees. I refer to gifts for the erection or maintenance of public works, or for lightening the burdens of taxation. In all these instances the donor not only may, but must, specify the particular town or geographical district which he intends as the object of his bounty. Otherwise his gift might be void as being vague and indefinite.³ Thus gifts to a town for the introduction of water, for building a town hall, and gifts toward the payment of the national debt, have been held good.⁴

356. It is well settled that a gift for the establishment, maintenance, or repair of a cemetery, churchyard, or public graveyard is good as a charity.⁵

But a gift to trustees for the purpose of erecting or maintaining a private tomb, vault, or monument is not good as a charity and is void for perpetuity.⁶ This is well settled in

¹ [Franklin v. Armfield, 2 Sneed, 542; Coggeshall v. Pelton, 7 Johns. Ch. 292.]

305. But a bequest in trust, "for the aid and support of those of my children and their descendants who may be destitute," is not a public charity: Kent v. Dunham, 142 Mass. 216.]

² 57 Me. 523.

³ [Jones v. Williams, Ambler, 651; Howse v. Chapman, 4 Ves.

⁴ See Jackson v. Phillips, 14 Allen, 539, and cases cited.

⁵ Vaughan v. Thomas, L. R. 33 Ch. D. 187, and cases cited; Dexter v. Gardner, 7 Allen, 243.

⁶ [Coit v. Comstock, 51 Conn. 352; Hartson v. Elden, 50 N. J. Eq. 522. See, also, Kelly v. Nichols, 17 R. I. 306.]

England.¹ So, also, a gift by a testator "to keep up in good repair all the tombstones and headstones of my relations and self" in a certain churchyard, was held to be void.² In 2 Perry on Trusts, § 706, it is erroneously stated to be well settled in Massachusetts that such gifts are good.³

357. Inasmuch as the repair of churches is one of the objects named in the statute of Elizabeth, it has been held in England that a gift for the maintenance and repair of a tomb or monument, or tablet inside of a church, is good, such an ornament constituting a part of the church. The judge said: "I apprehend that a gift of a sum of money to keep in perpetual repair the monuments in Westminster Abbey would be a good charitable gift."⁴

358. WHAT IS A "CHARITABLE" USE? It is carefully to be borne in mind that "charitable" in its legal sense is not synonymous with that word in its ordinary, popular sense, nor with the corresponding word "benevolent." Many gifts are benevolent, *i. e.* prompted by kindness and generosity, which are not in a legal sense charitable. And therefore it is now well settled that a devise or gift in terms, "in trust for benevolent purposes," is not a charity and is void.⁵

This is the law both here and in England.⁶ In *Morice v. Bishop of Durham*⁷ the gift was "to such objects of benevolence and liberality" as the trustees might select. Lord Eldon held this to be void as a charity.

In *James v. Allen*⁸ the bequest was "for such benevolent purposes" as the trustees "in their integrity and discretion may unanimously agree on," and this was held to be void. In *Chamberlain v. Stearns*, *supra*, the gift was to

¹ See *Vaughan v. Thomas*, L. R. 33 Ch. D. 187.

² *Dawson v. Small*, L. R. 18 Eq. 114.

³ *Bates v. Bates*, 134 Mass. 110.

⁴ *Hoare v. Osborne*, L. R. 1 Eq. 585. The Public Statutes of Massachusetts (ch. 82, §§ 8 & 17) provide that funds for the maintenance and repair of tombs, monuments,

etc., may be held and applied by cemetery corporations, or by town treasurers.

⁵ [*Ellis v. Selby*, 7 Sim. 352; s. c. 1 Myl. & Cr. 286. But see *Goodale v. Mooney*, 60 N. H. 528.]

⁶ *Chamberlain v. Stearns*, 111 Mass. 267.

⁷ 9 Ves. 399, 10 Ves. 522.

⁸ 3 Mer. 17.

trustees of an estate, "the income thereof, and the principal from time to time, to expend solely for benevolent purposes in their discretion." This was held void as a charity.

In *Nichols v. Allen*¹ the gift was to trustees to apply "to such persons, societies, or institutions as they may consider most deserving;" and this also was held to be void.

359. Where, however, the word "benevolent," or any other descriptive word, is used in connection either with the word "charitable," or in such context as to show an intent to make it synonymous with "charitable" in the legal sense, the court will give it that effect. This is the later and better doctrine.

It was formerly held in England in a case² much criticised that coupling the word "benevolent" with the words "charitable" and "religious" indicated that the testator had two distinct classes in mind as the objects of his bounty, one legal and the other illegal, and, inasmuch as the selection between them was left to the discretion of the trustees, the gift was void.

It is now held, however, that using the two words together indicates that by "benevolent" the testator intended what was strictly "charitable." The cases are carefully reviewed in *Saltonstall v. Sanders*,³ where it was held that a gift "for objects and purposes of benevolence or charity, public or private," was a good charitable bequest.⁴

In *Stone v. Attorney-General*⁵ the gift was for "charitable and deserving objects." This was held good as indicating such charitable classes of objects as were deserving, and not as indicating two distinct classes of persons.

360. Gifts for any religious purpose which does not contravene the laws or the policy of the country are good.⁶

¹ 130 Mass. 211.

² *Williams v. Kershaw*, 5 Cl. & Fin. 111.

³ 11 Allen, 446.

⁴ [*Contra*, *Norris v. Thomson*, 19 N. J. Eq. 307, 20 N. J. Eq. 489. See, also, *Kendall v. Granger*, 5 Beav. 300.]

⁵ L. R. 28 Ch. D. 464; see,

also, *Suter v. Hilliard*, 132 Mass. 412.

⁶ [*Gass v. Wilhite*, 2 Dana (Ky.), 170; *Rhymer's Appeal*, 93 Pa. St. 142; *Holland v. Allecock*, 108 N. Y. 312. A devise to an infidel society, to build a hall for the discussion of religion and politics, was held to be void: *Zeisweiss v. James*, 63 Pa. St. 465.]

The doctrine of superstitious uses is a thing of the past. All forms of religion, therefore, which are not hostile to the laws or policy of the State, may be the objects of good charitable gifts.

Polygamy is contrary both to the law of the land and to the whole spirit of modern civilization, and therefore any form of religion or irreligion, which inculcates polygamy, such as Mormonism, would not be an object of legal charity.

At one time in England, all gifts to propagate any faith contrary to that of the Established Church were void;¹ but now Anglican and Romanist, Jew and Gentile, Churchman and Dissenter, all stand equal before the law in this respect.

In re Schouler,² a gift for "charitable purposes, masses, etc.," was held valid as a charity.³

361. Gifts for the establishment of institutions of learning, from which all instruction in Christianity is excluded, are not against the policy of the law and are valid. This matter arose, or rather was more or less discussed, in *Vidal v. Girard*.⁴ The will there in question provided for the establishment of a home and school for the education of orphans, with the provision that no clergyman or ecclesiastic of any sort should ever be allowed within the institution, either as an officer, teacher, or visitor.

Mr. Webster, in his famous argument in this case, attempted to maintain in behalf of Girard's heirs that the gift was void, because the effect of the will was to exclude the teaching of Christianity; and, inasmuch as the Constitution and common law of Pennsylvania recognized Christianity (so he argued), no gift was good as a charity which was hostile to Christianity, or which forbade its inculcation.

The popular impression, derived more from reading this argument than from the opinion of the court, is, that the court held that a gift which forbade all religious or Christian

¹ In *Da Costa v. De Pas*, Amb. 228, a bequest to build a Jewish synagogue was applied by the court in aid of a Protestant hospital for foundlings.

² 134 Mass. 426.

³ [A contrary decision was made in *West v. Shuttleworth*, 2 Myl. & K. 684.]

⁴ 2 How. 127.

instruction was nevertheless a good charitable gift. They did not so decide, and the case did not call for any decision of that question. The court simply held that the exclusion of clergymen and ecclesiastics did not amount to the exclusion of Christianity, or of teachers of Christianity; that the prohibition against teaching any sectarian view or text did not prohibit teaching the general precepts and morality of the New Testament. In a word, the court held that Girard's will contained nothing hostile to Christianity, and nothing which forbade its being taught in the college. The court by their reasoning clearly intimate that a gift enumerating what studies shall be taught in a school or college cannot be held void because religious instruction is not included.

And this undoubtedly is the law. The statute of Elizabeth itself specifies "schools of learning," free schools, and "the education of orphans." It cannot, therefore, be doubted that a gift for establishing a school or for promoting education is good although no provision is made for religious instruction, and although religious instruction may be prohibited.

362. All gifts which contravene the policy of the law, or of the government, are of course void.¹ Thus it was held in England that gifts to promote the ecclesiastical supremacy of the Pope were void.² So, gifts to effect a change in our form of government,³ as to a monarchy, would be void for the same reason, and also because they would not be charitable uses under the statute.⁴

363. All gifts to secure a change in the laws, or in civil relations, or to effect any other object simply political in its nature, are not for charitable purposes within the statute. Thus it was held that a gift to obtain civil rights for women, such as the right to vote and to enjoy all other civil privi-

¹ [A bequest to purchase the discharge of poachers committed to prison for non-payment of fines was held void: *Thrupp v. Collett*, 26 Beav. 125.]

² *De Themmines v. De Bonneval*, 5 Russ. 288.

³ [But a devise for spreading Henry George's books on political economy was upheld, the motive being to educate the public: *George v. Braddock*, 45 N. J. Eq. 757.]

⁴ [*Russell v. Jackson*, 10 Hare, 204.]

leges which men have, was not good as a charity.¹ So, also, a gift to secure the right of suffrage to the negro was held invalid as a charity for the same reason.²

But a gift to secure the abolition of slavery by creating a proper public sentiment against it was held, and upon solid grounds, to be a good charity.³

364. PERPETUITIES AND ACCUMULATIONS. — The rule against perpetuities and accumulations does not apply to a charitable gift. A charitable trust may be made to last during all time.⁴ In England, as is well known, there are many charities which were created centuries ago.

365. Of the rule against perpetuities I have spoken already in treating of private trusts; but I have reserved for this place what I had to say about accumulations, both to avoid repetition and because the subject will be clearer if treated in connection with that of charities. The term "accumulation" means the continuous adding of the interest or income of an estate to the principal; and the rule against accumulations is the rule which prescribes the period beyond which this accumulation cannot be carried on.

The rule against perpetuities applies to the case where

¹ Jackson v. Phillips, 14 Allen, 539.

² Attorney-General v. Garrison, 101 Mass. 223, 239.

³ Jackson v. Phillips, 14 Allen, 539. [Whether a benefit association, the funds of which are used to assist needy members, is a charity, *quære*. It was held to be such in Duke v. Fuller, 9 N. H. 536. See, also, King v. Parker, 9 Cush. 71, 81; Indianapolis v. Grandmaster, 25 Ind. 508. *Contra*, Babb v. Reed, 5 Rawle, 151; Bangor v. Masonic Lodge, 73 Me. 428, and cases there cited.]

⁴ Russell v. Allen, 107 U. S. 163, 171; Jones v. Habersham, 107 U. S. 174, 185; [Yard's Appeal, 64 Pa. St. 95; Andrews v. Andrews, 110 Ill. 223; Estate of Hinkley, 58 Cal.

457. For the rule regarding perpetuities in private trusts, see *supra*.

But if a man gives his property to a private person, and then to a charity at a time more remote than the perpetuity period, the gift over is void: Attorney-General v. Gill, 2 P. Wms. 368; Company of Pewterers v. Christ's Hospital, 1 Vernon, 161. The result is the same where the order of gifts is reversed; that is, where the devise is first to a charity, and then over to a private person: Wells v. Heath, 10 Gray, 17, 25. But if the devise be to a charity, with a limitation over to another charity, the limitation is good, although it may not take effect within the perpetuity period: Christ's Hospital v. Grainger, 16 Sim. 83, 100; *In re* Tyler [1891], 3 Ch. 252.]

the donor gives the principal to trustees, but directs that the income thereof shall be paid to certain beneficiaries, for a certain period, and then that the whole estate shall pass to third persons.

The rule as to accumulations applies where the donor gives his estate to trustees, directing them to add the income to the principal during a certain period, at the end of which the entire accumulated fund goes to third persons, no one in the mean time having enjoyed the income.

In private trusts the rule against perpetuities also applies to trusts for accumulation. A settlor cannot restrain the alienation of his property, by any intermediate trust, for a period beyond lives in being and twenty-one years thereafter.

A similar rule also prevents him from postponing the beneficial enjoyment of his property beyond the same period by directing an accumulation of its rents, incomes, and profits. He may direct that all the income of the property shall be accumulated during that period and added to the principal, so that no one shall have the use or enjoyment of any part of the income or principal during that period, the income all going to swell the capital. But if he attempts to tie up the property beyond that period, the limitation is void.¹

366. Such being the common law, one Thellusson made a will leaving all his property to trustees, directing that it should be converted into one fund, and that the rents and profits should accumulate during the lives of all his sons, and of all his grandsons living at the time of his own death, and then, upon the death of the last survivor, that the whole estate should go to the third generation in a certain specified manner. He died in 1797, leaving three sons, three daughters, and £50,000. Accumulations might go on under this will for seventy-five years more, and thus the whole fund might amount in the end to £100,000,000, or \$500,000,000.² However, the will followed the rule, and it was

¹ [Griffith v. Blunt, 4 Beav. 248 ; and the property was then distributed. See Lord Rendlesham v. Roberts, 23 Beav. 321, 7 H. L. Cases, Hawley v. James, 5 Paige, 318 ; 1 Perry on Trusts, § 393.]

² Accumulation ceased in 1856, 429.

held valid.¹ But it led to the enactment of the statute against accumulations (statute 40 Geo. III. c. 98), commonly called the Thellusson Act, which provides that accumulations shall not be made except during one of three periods, as the testator or settlor may select, as follows: (1) The life of the settlor himself. (2) Twenty-one years from his own death. (3) During the minority of any particular person, living at the time of the settlor's death, who would be entitled to the rents and profits under the deed or will if of full age.

367. Wherever, then, this statute is in force, as it is in England, and by reënactment in some of the States of the Union,² trusts for accumulation solely must be limited to one of the periods prescribed in the statute. This statute has not been adopted in Massachusetts, and in that State the same rule as to perpetuities exists in the case of accumulation as in the case of alienation; that is, the period is limited to lives in being at the death of the testator, and twenty-one years thereafter.³

368. This clears the way for the matter which now concerns us, namely, that the rule against perpetuities (both in ordinary trusts and in accumulations) does not apply to charities; *i. e.* when the ultimate gift is to a charity, the testator may direct that his estate shall in the first place be allowed to accumulate for a longer period than is allowed by the rule against perpetuities, and, secondly, that during this period the income shall be added to the principal, so that at the end of the period the whole accumulated fund, or the income of it thereafter, shall be applied to the charity.⁴

We have seen that in the case of a trust, where the testator directed that his estate should accumulate for fifty years before being distributed to his beneficiaries, the restriction was void as being too remote, because fifty years might

¹ Thellusson v. Woodford, 4 Ves. 226; s. c. 11 Ves. 112 (*vide* 4 Kent Com. pp. 284, 285).

² [See 1 Perry on Trusts, § 398.]

³ Odell v. Odell, 10 Allen, 1.

⁴ [Philadelphia v. Girard, 45 Pa. St. 1; State v. McGowen, 2 Ired. (N. C.) Eq. 9; Tudor on Charitable Trusts, p. 56.]

exceed the term of any lives in being at the death of the testator and twenty-one years added thereto.¹

But when the gift is to a charity, the intermediate period for accumulation is not governed by the rule against perpetuities, and may greatly exceed the limit fixed by that rule.

In *Odell v. Odell*² the period of accumulation prescribed by the testator was fifty years, and the devise was held good.

369. Is there any legal limitation of this period? In *Odell v. Odell* the court declined to lay down any definite rule, but said that undoubtedly a testator might adopt a period so long as to contravene the general policy of the law, and that in such a case a court of equity, having full jurisdiction over charities, might exercise its authority to direct that the estate should be applied after a reasonable time, without further accumulation, to the purposes of the charity.

However long the period of accumulation prescribed by the testator might be, it is very improbable that the court would hold the charitable gift void for remoteness. In the exercise of its supervising power, the court would cut down the limitation to some reasonable period, having reference to the nature and probable requirements of the charity to which the fund was to be applied.³

370. The rule prohibiting restraint of alienation does not apply to charitable gifts. At common law, any restriction prohibiting the alienation or transfer of an estate beyond lives in being and twenty-one years thereafter, is, as we have seen, void; but a charitable gift may prohibit alienation of the estate through all time, and such a prohibition is valid.⁴

371. Although alienation by the trustees is thus prohibited, yet if the property, as for instance a church building, becomes, by a change of circumstances or surroundings, entirely unsuited to the purposes of the trust, a court of chancery, in the exercise of its supervisory power over charities,

¹ *Hooper v. Hooper*, 9 Cush. 122 (30 years); *Thorndike v. Loring*, 15 Gray, 391 (50 years). ³ [But see *Hillyard v. Miller*, 10 Pa. St. 326.]

² 10 Allen, 1. [See, also, *Woodruff v. Marsh*, 63 Conn. 125.] ⁴ *Perin v. Carey*, 24 How. 465; *Jones v. Habersham*, 107 U. S. 174, 185.

may direct a sale of the estate, and investment of the proceeds in other property for the same purposes.¹

372. In construing a charitable gift, restrictive words will be held, if possible, to mean a restriction and not a condition. Even where a charitable gift is made in terms, upon condition that the estate given shall be used only for the purposes of the gift, these words ordinarily will be held to create, not a technical condition, but only a restriction as to the uses to which the gift is to be applied. The difference is a very important one, and it may be stated thus: If the words amount to a condition, then the particular estate devised can be used only for the charitable purpose; no sale of it can take place, no matter what the emergency, without working a forfeiture and causing the estate to revert to the grantor or his heirs. But if it be only a restriction, then, when the emergency arises, a sale may take place under the authority of the court, the proceeds of the sale being applied to the charity.²

373. A CHARITABLE GIFT NEVER FAILS FOR WANT OF A TRUSTEE.³—If this want occurs, either because the donor has failed to name a trustee, or because the trustee named dies, declines, resigns, or is unable to act, a court of equity will appoint a suitable trustee in his place. This is also true where legislation may be necessary to authorize the person or corporation named to take or administer the charity.⁴

¹ *Episcopal City Mission v. Appleton*, 117 Mass. 326; *Stanley v. Colt*, 5 Wall. 119, 169; *Jones v. Habersham*, 107 U. S. 174, 183; [*Academy of the Visitation v. Clemens*, 50 Mo. 167; *Franklin v. Armfield*, 2 Sneed, 305; *Burton's Appeal*, 57 Pa. St. 213; *In re Suir Island Charity School*, 3 Jo. & Lat. 171; *Brown v. Baptist Society*, 9 R. I. 177.]

² *Episcopal City Mission v. Appleton*, 117 Mass. 326, *supra*; *Sobier v. Trinity Church*, 109 Mass. 1; *Stanley v. Colt*, 5 Wall. 119, 169.

In *Attorney-General v. Merrimack Manufacturing Co.* (14 Gray, 586), and in *Hayden v. Stoughton* (5 Pick. 528), the language was too clear to admit of doubt, the estates being given strictly upon condition. In *Brigham v. Shattuck* (10 Pick. 306) the court declined to express an opinion upon the subject, inasmuch as it was not necessary to a decision of the case.

³ [*Sears v. Chapman*, 158 Mass. 400.]

⁴ *Sobier v. Burr*, 127 Mass. 221; *Fellows v. Miner*, 119 Mass. 541.

374. A gift to such charitable purposes as the trustee or other designated persons may select is good.¹

In a private trust, on the other hand, as we have seen, the donor must himself indicate the objects of his bounty, and, if there be uncertainty in this respect, the trust will fail.

375. Where the selection of the charitable objects is left to the trustees, and they for any reason fail to act, either because they die or decline the trust, the power of trustees subsequently appointed to act depends upon the question, whether the intent of the testator was to repose a personal trust and confidence exclusively in the trustees originally named by him, or whether he intended that this discretion should be exercised by whomever was trustee for the time being.²

This intent is to be arrived at, if possible, by a fair construction of the whole instrument. A court of equity will always struggle hard, however, to maintain a charitable gift, and it is therefore predisposed to hold that this power attaches to the office of trusteeship, unless it is very clear upon the face of the will that the testator intended to limit it to the individuals originally appointed by him.

In *Lorings v. Marsh*³ the devise was to the trustees and their successors, and it was held that the power to select was not confined to the original trustees.

Any general clause giving the power to "my trustees," or "the trustees under this will," would be held, undoubtedly, to have the same effect.

376. In *Fontain v. Ravenel*⁴ the testator empowered his executors, or the survivor of them, after the death of his wife, to dispose of his estate "for the use of such charitable

[Howard v. American Peace Society, 49 Me. 288; Schmidt v. Hess, 60 Mo. 591; Heuser v. Heuser, 42 Ill. 425. See 2 Pomeroy's Eq. § 1026, and note.]

¹ Wells v. Doane, 3 Gray, 201; Saltonstall v. Sanders, 11 Allen, 446; Jackson v. Phillips, 14 Allen, 539; [Derby v. Derby, 4 R. I. 414; In re Kinike's Estate, 155 Pa. St. 101; White v. Ditson, 140 Mass. 351; Everett v. Carr, 59 Me. 325; Howe v. Wilson, 91 Mo. 45; Moore v. Moore, 4 Dana (Ky.), 354. See, also, Miller v. Atkinson, 63 N. C. 537.]

² [Reeve v. Attorney-General, 5 Hare, 191.]

³ 6 Wall. 337.

⁴ 17 How. 369, 382.

institutions in Pennsylvania and South Carolina as they or he may deem most beneficial to mankind." Both executors died before the wife, and the court held that the power of selection was personal, confined to the executors, and therefore that the gift failed. The gift in this case was so general in its terms that it would have required an exercise of the "prerogative power," the court held, as distinct from a judicial power, to distribute the charity, — a power which that court disclaimed. Moreover, the authority of this case has been doubted.¹

377. I had supposed the rule to be, that a gift in trust for charitable purposes generally, where the testator neither designated the class of objects nor gave that power to a trustee, was void for vagueness and uncertainty;² and also that where the right to select the objects was confided to a particular trustee named, as a personal trust, and he failed to exercise his discretion in appointing the objects, the gift failed.³ But the Supreme Court of Massachusetts, in *Minot v. Baker*,⁴ have taken a different view, holding: (1) That a gift for "charitable purposes" is good, and that the court can adopt a scheme appointing the beneficiaries; and (2) That where the gift is to a trustee "for such charitable purposes as he shall think proper," and the trustee dies without having appointed beneficiaries, the court may act and appoint the beneficiaries.

378. Such a gift, to be good, must be strictly and expressly for charitable objects, leaving a discretion to the trustees only in selecting the particular object. Where the gift is to trustees for such charitable or other purposes as the trustees may select, the gift is void, because it depends upon the mere will and pleasure of the trustees, to apply it to charitable purposes or not. Under the will they have as much right to dispose of it in one way as in the other. The court cannot compel them to apply any of it to any charity. The

¹ See *Jackson v. Phillips*, 14 Allen, 539, 588. 366; *Bridges v. Pleasants*, 4 Iredell Eq. 26.]

² [*Heiss v. Murphy*, 40 Wis. 276; *Webster v. Morris*, 66 Wis. 252.] ³ [*Gambell v. Trippe*, 75 Md. 252.]

⁴ 147 Mass. 348.

objects of the trust being thus wholly vague and undefined, it is void for uncertainty.¹

In *Nichols v. Allen*² it is said: "A trust which by its terms may be applied to objects not charitable in the legal sense, and to persons not defined by name or by class, is too indefinite to be carried out."

379. A corporation, whether civil, municipal, or eleemosynary, may be the trustee of a charitable gift, unless prohibited by its charter or by positive law. Thus a town, a State, or the United States may be the recipient of such a gift as trustee. In one case a city was made trustee of a fund for the education of its poor inhabitants.³

In *President of the United States v. Drummond*,⁴ an Englishman had made a large bequest to the United States of America to found an institution "for the increase and diffusion of knowledge among men." This bequest was upheld by Lord Langdale, and in consequence the Smithsonian Institution at Washington was founded.

So it is held that a gift or devise may be made to a state or sovereignty, although it is not a charitable gift.⁵

The case of *United States v. Fox*⁶ was decided upon the ground that, by the law of New York (the testator's State), no devise could be made except to a natural person, or to a corporation created by that State.

380. A good charitable gift may be made by a donor residing in one county for beneficiaries residing in another State or county.⁷

In *Fellows v. Miner*⁸ there was a gift by a resident of Massachusetts to a town in New York for "the benefit of

¹ *Vezey v. Jamson*, 1 S. & S. 69.

² 130 Mass. 211.

³ *Executors of McDonogh v. Murdoch*, 15 How. 367; *Perin v. Carey*, 24 How. 465; [*Chambers v. City of St. Louis*, 29 Mo. 543; *Prickett v. People*, 88 Ill. 115; *The Dublin Case*, 38 N. H. 459; *Philadelphia v. Fox*, 64 Pa. St. 169. See *supra*, p. 85.]

⁴ Cited in *Whicker v. Hume*, 7 H. L. Cases, at p. 155.

⁵ *Dickson v. United States*, 125 Mass. 311.

⁶ 94 U. S. 315.

⁷ [*Domestic Society's Appeal*, 30 Pa. St. 425; *Mitford v. Reynolds*, 1 Phillips, 185. But see *Methodist Church v. Remington*, 1 Watts, 218.]

⁸ 119 Mass. 541.

such aged and infirm native-born citizens of the town, and maiden ladies, native born, all inhabitants, although not aged, as shall be deemed by the trustees most deserving." This was held to be a valid gift.

In *Sohier v. Burr*¹ a bequest by a citizen of Massachusetts was sustained for the benefit of the "poor, meritorious widows" living in and belonging to a certain parish in Connecticut.

381. No misconduct of the trustees in administering a charitable fund avoids the gift, or entitles the heirs of the donor to claim it under a resulting trust.² In such a case the court will remove the delinquent trustees and appoint others in their place, but the charitable gift does not fail.

382. Other instances of good charities are: (a foundling hospital), *Ould v. Washington Hospital for Foundlings*, 95 U. S. 303; (education), *Suter v. Hilliard*, 132 Mass. 412; and *Boxford Religious Society v. Harriman*, 125 Mass. 321; (a hospital), *McDonald v. Massachusetts General Hospital*, 120 Mass. 432; (poor widows), *Gooch v. Association for Relief of Aged Females*, 109 Mass. 558; (agriculture), *Rotch v. Emerson*, 105 Mass. 431; (a soup kitchen), *Biscoe v. Jackson*, L. R. 35 Ch. D. 460.³

Where the bequest was for "reparations, ornaments, and other necessary occasions of the parish church," it was held that the cost of a spire to hold a chime of bells was within the gift.⁴

383. GIFTS NOT GOOD AS CHARITIES.⁵ — A gift to aid

¹ 127 Mass. 221.

² *Sanderson v. White*, 18 Pick. 328.

³ [*Miller v. Porter*, 53 Pa. St. 292; *Hesketh v. Murphy*, 35 N. J. Eq. 23. It may be a charitable institution, notwithstanding a fee be charged: *Female Academy v. Sullivan*, 116 Ill. 375.]

⁴ *In re Palatine Estate Charity*, L. R. 39 Ch. D. 54.

⁵ [*Attorney-General v. Hewer*, 2 Vernon, 387; *Attorney-General v. Haberdashers' Company*, 1 Myl. &

K. 420; *Habershon v. Vardon*, 7 Eng. L. & Eq. 228 (where the object was to restore Jews to Jerusalem); *Stratton v. Physio-Medical College*, 149 Mass. 505; *Burke v. Roper*, 79 Ala. 138; *Attorney-General v. Soule*, 28 Mich. 153. A gift for the purpose of supplying the scholars of a Sunday-school with Christmas presents is not a charity: *Goodell v. Union Association*, 29 N. J. Eq. 32. See, also, cases *supra*, p. 189 *et seq.*]

in the preservation of Shakspere's house, and to establish a museum there, was held not to be a charity.¹

Cy Pres.

384. Another important characteristic of charities is found in the doctrine called *cy pres*. The general rule on this subject may be stated thus : —

Where a donor has made a good charitable gift, specifying the objects of his charity, and these for any reason fail, or do not exhaust the fund, and it is apparent that the donor intended to devote the whole fund to charity, a court of equity will apply the fund, or the surplus, to such charitable objects as most nearly resemble, or accord with, those selected by the donor.

385. But this rule is to be taken with certain important limitations ; and, for reasons which will soon be apparent, its application is much more restricted in this country than it is in England. From time immemorial the Court of Chancery in England has exercised two functions in respect to charities, one being a judicial function, a part of its regular jurisdiction, both before and after the statute of Elizabeth, as a court of equity. The other function is one exercised by the Chancellor in behalf of the king, under his sign manual, as *pater patriæ*. As *pater patriæ* the king assumed and exercised the prerogative to apply a charitable gift, where the original purpose of the donor failed for any reason, to such purposes as he saw fit, without regard to the wishes or preferences of the donor. This prerogative was exercised by the Lord Chancellor as the keeper of the king's conscience. Since, therefore, in dealing with charities, he exercised two functions, the distinction between what was done under the prerogative power and what under the judicial power was not carefully preserved. The consequence was that nominally, under this doctrine of *cy pres*, charitable gifts were applied by the Court of Chancery to objects as foreign to the intent and wishes of the donor as could well be imagined. A noted and scandalous instance is where a gift was made for a Jewish synagogue, and the court applied

¹ Thomson v. Shakespear, 1 De G., F. & J. 399.

it to the support of a Protestant hospital.¹ This was before Jews were allowed any civil rights, and when gifts to dissenting chapels were held illegal.²

386. The courts in this country very properly disclaim the right to exercise this prerogative power.³ Their function is merely a judicial one, and therefore their duty in dealing with all charitable gifts is strictly to carry out the intent of the donor; and this obligation exists in the application of the rule of *cy pres* as well as elsewhere.⁴

In fact, the presumed intent of the donor really lies at the foundation of the rule of *cy pres*, and that intent should also be the guide in its application.⁵

This, then, is the first requisite, namely, that the donor should have had a general charitable intent in reference to the fund given; that he intended to give it absolutely and irrevocably to charity, and did not intend to limit it to the specific objects named by him, so that, if they failed for any reason, the gift should revert to his estate.

If the latter should be the true construction in any case, then upon the failure of those specific objects, there is no room for the doctrine of *cy pres*; the court has no right to touch the fund, and it reverts to the donor's estate.⁶

387. Such instances have occurred, where it was obvious that the donor had only some particular object in view, or where it was clear that his charity was limited to some special purpose or definite period. *Easterbooks v. Tilling-*

¹ *Da Costa v. De Pas*, Amb. 288.

² [*Attorney-General v. Baxter*, 1 Vernon, 248; *Attorney-General v. Guise*, 2 Vernon, 266, citing *Gates and Jones's Case*.]

³ [*Jackson v. Phillips*, 14 Allen, 539; *Henry Co. v. Winnebago Co.* 52 Ill. 454; *Grimes v. Harmon*, 35 Ind. 198, 247; *Green v. Allen*, 5 Humph. 170, and cases cited *infra*. For an interesting case dealing with this prerogative power, see *Mormon Church v. United States*, 136 U. S. 1. Many courts, however, have not separated the prerogative

and judicial powers, but refuse to exercise either: *Holland v. Alcock*, 108 N. Y. 312; 2 *Perry on Trusts*, § 748.]

⁴ [*City of Philadelphia v. Heirs of Girard*, 45 Pa. St. 1, 28.]

⁵ [*Gilman v. Hamilton*, 16 Ill. 225; 2 *Perry on Trusts*, § 727.]

⁶ [*Missouri Historical Society v. Academy of Science*, 94 Mo. 459; *Russell v. Kellett*, 3 Sm. & Gif. 264; *Attorney-General v. Jolly*, 2 Strob. Eq. (S. C.) 379; *McAuley v. Wilson*, 1 Dev. Ch. 276.]

*hast*¹ is an illustration. In that case the gift was to support the pastors of "the six-principle Baptist church in Swanzey," "so long as they or their successors shall maintain the visibility of a church in said faith and order." It was held, upon the dissolution of the church, that the gift reverted to the donor's estate.

In *Broadbent v. Barron*² the gift was to a particular hospital for the blind. It was held that the testator intended a gift to that particular institution, and not for the benefit of the blind generally; and, as that institution had ceased to exist, the legacy lapsed.

In *Randell v. Dixon*³ there was a gift of £14,000 in trust to pay the income to the incumbent, for the time being, of a church at H——, so long as he permitted the sittings of the church to be free, but in case of his receiving pew rent the trust was to cease.

In *Walsh v. Secretary of State*⁴ there was a gift made by Lord Clive, in 1770, of £20,000 to pay pensions to officers in the military and naval service of the East India Company; but if said company should cease to employ a military or naval force, then to his executors or administrators. In 1858, after the great India mutiny, the whole power of the East India Company to employ a military or naval force was taken away and vested in the English government exclusively, and consequently it was held that the charity terminated.

388. Where the donor has not himself designated the specific objects, and has not given to trustees the power to select them, it is necessary that the general nature of the charitable purpose should have been indicated by the donor in order to authorize the court to designate the particular objects under the rule of *cy pres*.⁵

Unless there is some such general designation by the donor, the gift is void for vagueness and uncertainty. If, therefore, the devise or gift is simply "for purposes of charity," or "for such charitable purposes as I shall here-

¹ 5 Gray, 17.

² L. R. 29 Ch. D. 560.

³ L. R. 38 Ch. D. 213.

⁴ 10 H. L. Cases, 367.

⁵ But see *Minot v. Baker*, 147 Mass. 348, *supra*.

after designate," and no such designation is made, the gift is void for uncertainty; the court cannot give effect to it, because there is no guide whatever as to the intent of the testator. Such was the case of *Fontain v. Ravenel*, 17 How. 369, *supra*.

389. On the other hand, "when a gift is made to trustee for a charitable purpose, the general nature of which is pointed out, and which is lawful and valid at the time of the death of the testator, and no intention is expressed to limit it to a particular institution or mode of application, and afterwards, either by change of circumstances the scheme of the testator becomes impracticable, or by change of law becomes illegal, the fund, having once vested in the charity, does not go to the heirs at law as a resulting trust, but is to be applied by the Court of Chancery, in the exercise of its jurisdiction in equity, as near the testator's particular directions as possible, to carry out his general charitable intent."¹

Two or three instances will serve to illustrate the rule. In *Jackson v. Phillips*¹ two charitable bequests were made, one being "for the preparation and circulation of books, newspapers, the delivery of speeches, lectures, and such other means as in the judgment of the trustees will create a public sentiment that will put an end to negro slavery in this country." The other was "for the benefit of fugitive slaves who may escape from the slaveholding States of this infamous Union from time to time."

Although slavery was abolished, after the death of the testator, by the Thirteenth Amendment, the court held that the gifts did not fail; they held that, in pursuance of the general charitable intent clearly indicated by the testator toward the negro, the gift should be applied *cy pres*; and that the first gift should be devoted to the education, support, and interests generally of the freedmen in the former slave

¹ *Jackson v. Phillips*, 14 Allen, N. H. 315; *Pell v. Mercer*, 14 R. I. 539, 580; [*In re Campden Charities*, L. R. 18 Ch. D. 310; *McIntire v. City of Zanesville*, 17 Ohio St. 352; *Second Congregational Society v. First Congregational Society*, 14 N. H. 315; *Pell v. Mercer*, 14 R. I. 412; *Darcy v. Kelley*, 153 Mass. 433; *Estate of Hinckley*, 58 Cal. 457; *Attorney - General v. Ironmongers' Co.* 2 Beav. 313; *In re Slevin* [1891], 2 Ch. 191.]

States; and that the second gift should be applied to the use of necessitous persons of African descent in Boston and vicinity, preference being given to those who had escaped from slavery.

390. Count Rumford made a gift, the income of which was to be paid from time to time to the authors of such "discoveries or improvements in light and heat" as in the judgment of the trustees should prove most beneficial to mankind. No beneficiaries having appeared, the court directed that the annual income should first be applied to the payment of such authors and discoverers, if any should arise, and that the surplus should be expended in such lectures, experiments, and investigations as in the judgment of the trustees would most facilitate and encourage the making of such discoveries and improvements. Here the *cy pres* object was closely allied to, in fact almost identical with, the original object.¹

In the case of *Attorney-General v. Glyn*² a school had been founded for the education of poor children in a certain district. One hundred years later, under an Act of Parliament, the district was converted into a dock, so that there were no longer any children in the district. The court held that the charity did not fail, but that it should be applied *cy pres*, and they referred the case to a master to report a proper scheme. (The report does not show what scheme was adopted.)

391. Where, by the original gift, specific sums are given to different objects, and the income proves more than sufficient to pay these sums, yet, if the intention to devote the entire income to charity is clear, the surplus will not revert to the donor or his estate, but will be applied *cy pres* by the court. The rule governing private trusts, that all amounts not required for the objects specified revert by resulting trust to the donor or his estate, as a matter of course, does not apply to a charity. The surplus in the case of a charity will be devoted to other kindred objects, or, if the special objects selected by the donor have since become more necessitous,

¹ American Academy, etc. v. Harvard College, 12 Gray, 582.

² 12 Sim. 84.

then the surplus will be devoted to them, provided always that the testator intended to devote the whole fund to charity.¹

This general charitable intent (as it has sometimes been called) must be manifest — an intent, that is, to devote the property, once and for all, to a charitable purpose. If the donor merely intended to aid some specific charity and to stop there, then, if that object is accomplished, or for any reason fails, a trust for the surplus, as we have seen, results to the donor or his representatives.²

392. STATUTE OF LIMITATIONS. — As a general rule, the statute of limitations does not apply to charities. The case calls for a distinction.

As against a mere wrong-doer, one who misappropriates a charitable gift, no lapse of time is a bar. The reason is this: the ultimate right to all public charities, and the duty to supervise and protect them, are in the sovereign, and no time runs against the sovereign.

In *Attorney-General v. Old South Society*³ the rule is thus stated: "The statute of limitations affords no absolute bar or limit; and when trustees, with knowledge of the charitable use and no reasonable excuse for mistake, have misappropriated the whole or part of the income, they will be held to account for it during the whole period of misappropriation, unless grave inconvenience or hardship would be caused by so doing." *A fortiori* will this be true where trustees have misappropriated the fund to their own personal benefit.⁴

393. In England, by statute 3 & 4 Wm. IV. cap. 27, the

¹ 2 Perry on Trusts, § 725, and cases cited; [Attorney-General v. Minshull, 4 Ves. 11; Marsh v. Renton, 99 Mass. 132.]

² The statement made in 2 Perry on Trusts, § 725 *ad fin.*, that trustees in some cases will take the surplus beneficially, is incorrect, if it means that they take it by resulting trust, or indeed in any way, except by express gift of the donor. Such was the case in *Attorney-*

General v. The Wax Chandlers, L. R. 5 Ch. App. 503, cited by Mr. Perry.

³ 13 Allen, 474, 496.

⁴ *Attorney-General v. Christ's Hospital*, 3 Myl. & K. 344 (one hundred and fifty years); *Attorney-General v. Munro*, 2 De G. & Sm. 122; *Attorney-General v. Beverley*, 6 De G., McN. & G. 256; *Attorney-General v. Rochester*, 5 De G., McN. & G. 797.

attorney-general is now barred from interfering after an acquiescence of twenty years.

In Massachusetts the provision in the Public Statutes, ch. 197, § 21, limiting the time within which personal actions may be brought "by the Commonwealth or for its benefit" to the same period which is applicable to individuals, does not, I presume, apply to public charities; that it does not is implied in *Attorney-General v. Old South Society*, *supra*; and see, also, *Attorney-General v. Trinity Church*, 9 Allen, 422, 447.

394. As between two charitable objects, each asserting that the gift was intended for it, the court will not interfere after a long-continued use by one, "without conclusive evidence that the charity has been perverted," *i. e.* applied to the wrong object.¹

395. The sovereign, whether state, president, or king, has the ultimate right in all charities, and the sole power to enforce them. The beneficiaries, of course, have an equitable interest, and the legal title to the property is in the trustees. Still, in a certain indefinable sense, all public charities belong to the sovereign, and, as is universally admitted, the power to enforce them rests with him.

Lord Eldon said that it is the duty of the king, as *pater patriæ*, to protect property devoted to charitable purposes, and upon this foundation rests the right of the attorney-general to interfere. It is an inflexible rule that all legal proceedings brought to enforce or protect a public charity must be brought by and in the name of the attorney-general, representing the sovereign.² And in all suits by trustees brought for the advice and instruction of the court as to the proper interpretation of the gift, or as to their duties, the attorney-general should be made a party, either as plaintiff or defendant.³

¹ 2 Perry on Trusts, § 745.

² As in *Jackson v. Phillips*, *supra*,

³ *Jackson v. Phillips*, 14 Allen, at [Chamberlain v. Stearns, 111 Mass. p. 579; [Wellbeloved v. Jones, 1 Sim. & St. 40.] 267.]

CHAPTER XV.

ACCIDENT.

396. THE next branch of equity jurisdiction to be considered is relief in cases of accident.

It is very difficult, if not impossible, to give an accurate definition of the word "accident" as employed to denote one of the branches of equity jurisprudence. Such definitions have been attempted by text-writers and commentators, but each one finds some radical defect in the definition of every other. It is safe to presume that the word as thus employed is not used in its natural and proper sense, but has a restricted and to some extent an artificial meaning.

Mr. Jeremy has defined it as "an occurrence in relation to a contract which was not anticipated by the parties when the same was entered into, and which gives an undue advantage to one of them over the others in a court of law."¹

This definition, as Judge Story has pointed out, is defective in at least two important particulars: First, it is confined to contracts, whereas, as is well settled, relief in equity on the ground of accident is not limited to the case of contracts; and, secondly, the definition does not exclude unexpected occurrences resulting from the negligence or fault of the party seeking relief.

Judge Story has defined "accident" (1 Story's Eq. § 78) as meaning "such unforeseen events, misfortunes, losses, acts, or omissions as are not the result of any negligence or misconduct in the party."

397. With the help of Smith (Smith's Manual of Equity Jurisprudence), I have framed this definition:—

An unforeseen and injurious occurrence, not attributable

¹ Jeremy's Eq. p. 358.

to mistake, negligence, or misconduct,¹ against the consequences of which a court of law affords no adequate redress.²

It would be unsafe, probably incorrect, to say that every occurrence coming within the above description is relievable in equity; it would be more accurate to say that equity does not give relief in any case where all the conditions mentioned are not found.

It is an important part of the definition that the occurrence is not attributable to mistake, because mistake is not accident, and of itself constitutes a distinct ground for relief, which will be considered later.

The cases in which courts have granted relief on the ground of accident are comparatively limited; and the more instructive method will be to state the leading instances in which a court of equity will both take and refuse jurisdiction on the ground of accident.

398. LOST DEEDS, PROMISSORY NOTES, ETC. — One of the principal cases for relief under this head is that of the loss of deeds and other sealed instruments, and of negotiable promissory notes.

The foundation of the jurisdiction in case of the accidental loss or destruction of sealed instruments has been stated as follows: Under the common-law system of pleading, in bringing an action upon any sealed instrument it was necessary to make profert of it in the declaration, *i. e.* an offer to bring the instrument into court and submit it to the inspection of the court and of the defendant; and a declaration not making such profert was bad. If the instrument was lost or destroyed, it was impossible to do this; and in this emergency, it being manifestly unjust that by the accidental loss of a paper any one should be deprived of substantial rights, equity came to the relief and took jurisdiction.³ Upon a bill in equity, profert not being necessary,

¹ [Denny v. Martin, 4 Johns. Ch. 566; Barnet v. Turnpike Co. 15 Vt. 757.]

² [*Ex parte* Greenway, 6 Ves. 812. So equity will compel the remaking of a deed that has been destroyed before recording: Kent v. Church of St. Michael, 136 N. Y. 10.]

³ [Atkinson v. Leonard, 3 Brown's Ch. 218; Toulmin v. Price, 5 Ves. 235; Patton v. Campbell, 70 Ill. 72; Lawrence v. Lawrence, 42 N. H. 109; Reeves v. Morgan, 48 N. J. Eq. 415. Upon the general principle already stated (*i. e.* that equity retains a jurisdiction once acquired.

the plaintiff, by showing the loss of the instrument, could prove its contents by any competent testimony, and the court would then proceed to give the appropriate relief.

399. This technical reasoning did not include promissory notes, because profert was not necessary to be made of them, that rule applying only to sealed instruments. But here another consideration came in. As a general rule, upon the payment of a promissory note, the party paying is entitled to its possession. If it were lost, of course no delivery could be made, and therefore the promissor or indorsee might well decline to pay.¹

Equity took jurisdiction in these cases because, first, it was unjust that a loss should be incurred by the payee, if proper security could be afforded to those liable on the note against being called upon to pay it again; and, secondly, because it was in the power of a court of equity to require that such indemnity should be given. Therefore equity gave relief in cases of lost notes and bills of exchange, upon the payee furnishing such indemnity as the court thought reasonable to protect the makers from any further claim or liability.²

400. In Massachusetts, before the Supreme Court acquired equity jurisdiction, it was held, under the pressure of the case, that an action at law might be maintained against the maker of a lost note upon the plaintiff's filing a bond, satisfactory to the court, to indemnify the maker against any possible future claim or loss.³

401. But this proceeding could not be had in respect to any party to a promissory note other than the maker. An although the same relief can now be given by courts of law), the fact that profert is not now necessary at common law does not oust the equity jurisdiction in respect to lost instruments: *Force v. City of Elizabeth*, 27 N. J. Eq. 408. And equity, having assumed jurisdiction, will of course give full relief: *Hall v. Wilkinson*, 35 W. Va. 167.]

² [According to the better authority, it is immaterial whether the instrument be negotiable or not. Even a simple contract, such as a warehouse receipt, is within the rule: *Hardeman v. Battersby*, 53 Ga. 36; *Hickman v. Painter*, 11 W. Va. 386.]

³ *Jones v. Fales*, 5 Mass. 101; *Fales v. Russell*, 16 Pick. 315; *Almy v. Reed*, 10 Cush. 421.

¹ *Hansard v. Robinson*, 7 B. & C.

indorser is entitled, upon payment, to the note itself, as evidence of payment, and as the foundation of his claim against the prior indorsers or the maker. It is settled, therefore, that no action at law is maintainable against him upon a lost note, and that the only relief is in equity, because there alone can such provision be made for his indemnity as the case calls for.

The same is true as to the acceptor of, or other party to, a bill of exchange. Although the acceptor is primarily liable on the bill, as the maker is on the note, yet the possession of the bill is necessary in the settlement of accounts with his co-respondent, the drawer, who, as between themselves, is often the person finally liable. The proper remedy, therefore, is in equity.¹

Where there is a promise by letter to accept a bill to be drawn and the drafts are lost, the relief is in equity, as it is upon an accepted bill.²

402. AS TO BANK BILLS it seems clear that, when they are lost, no recovery ought to be had either at law or in equity against the bank which issued them. These bills pass from hand to hand as currency, and the bank is obliged to redeem each bill when presented at its counter for that purpose, and not otherwise. It is entitled to the possession of the bill, for, so long as the bill is outstanding, it constitutes a good demand against the bank. It is therefore certain that no bond of indemnity could practically meet the case. When a bill is presented, how can the bank determine whether it is one of the bills lost? If those bills had been identified by their numbers, it might possibly be done; but this would entail upon the officers of the bank the necessity of comparing every bill offered for redemption with the description in the bond of indemnity, a task which could not reasonably be imposed upon them. Nor, if the bill were identified, would this justify the bank in refusing to redeem it when offered by the holder, who is presumably a *bonâ fide* holder. No case has ever held a bank liable simply for lost bills, so far as I am aware.

¹ Tuttle v. Standish, 4 Allen, 481; ² Savannah National Bank v. Macartney v. Graham, 2 Sim. 285. Haskins, 101 Mass. 370.

403. But when bank bills have been destroyed, and the proof of this and of their identity is positive, the right to recover for them in equity, upon tender of a proper indemnity, is clear.

It would seem that such recovery can be had also at law in those States where the courts of law have assumed to require a plaintiff to furnish indemnity for lost notes.¹

404. In *Tower v. The Appleton Bank*² a strict rule was applied, and it was held that, although the proof was that bills of a certain bank amounting to a certain sum were destroyed by fire, the plaintiff could not recover without such other specific proof as would distinguish the bills destroyed from all other bills of the same denomination issued by the bank, and that no bond of indemnity could be taken.

This seems to me too rigid, and as a legal proposition unsound. If the proof is clear (of which a jury must judge) that one thousand dollars in five-dollar bills of a certain bank have been destroyed, it is unjust that the loser should fail to recover merely because those bills cannot be distinguished from other five-dollar bills of the same bank. The bank cannot be exposed to any second claim for the bills destroyed.

405. PENALTIES AND FORFEITURES. — It is an axiom that equity will not entertain a bill to enforce a penalty or a forfeiture. But, more than this, equity will relieve against the penalty of a bond.

Where a bond is given in a penal sum, the condition being for the payment of a certain sum of money or the performance of any other act on or before a day named, if default is made by the obligor, the obligee is entitled to a judgment at law for the full amount of the penalty, although the sum of money due, or the damages sustained by breach of the condition, are very much less than the penal sum.

Originally, the only relief against this hardship was in

¹ As to destroyed bills, see *Hinsdale v. The Bank of Orange*, 6 Wend. 378; *Bullet v. Bank of Pennsylvania*, 2 Wash. C. C. 172; *Martin v. Bank of the United States*, 4 Wash. C. C. 253. ² 3 Allen, 387.

equity, where the court relieved the obligor from the penalty of the bond upon payment of the amount due, or upon performance of the other act or condition required by the bond. It was said that the ground of this jurisdiction was accident, *i. e.* that, the party having accidentally failed to perform the condition of his bond by the day named, equity came to his aid, and relieved him of this burden upon his performing whatever he was equitably bound to do. And so relief against penalties has commonly been ranged under the head of accident.

But such reasoning is much forced, and in most cases it proceeds upon an untrue assumption. The failure to pay, or to perform any other condition, does not proceed ordinarily from any unforeseen or unavoidable occurrence, but solely from the neglect or poverty of the obligor; and, in attempting to place the equitable jurisdiction upon the ground of accident, the jurisdiction itself is unduly narrowed and involved in illogical consequences.

406. The true ground, as it seems to me, for relief in these cases, is the simpler and broader one, that a penal bond is but a security for the performance of the condition named therein, and therefore a court of equity will not allow it to be used in any other way. It is an inflexible rule in equity, of frequent application, that no matter what form or disguise the instrument or the transaction may take, if its real purpose was to secure the payment of a debt or the performance of any other obligation, it shall not be used for any other purpose, or have any other force or effect. And therefore, when a penal bond is given in the sum of two thousand dollars to secure the payment of a note of one thousand dollars, justice is done by relieving the obligor from the penalty of the bond upon his paying the full amount of the true debt with interest.

407. Equity cannot relieve in every case where the instrument is in the form of a penal bond.

The same consideration, which I stated as constituting the basis of equitable jurisdiction in these cases, defines also the true limit of that jurisdiction. It exists only in those cases where the penalty can be considered merely as a security for

the performance of the condition of the bond. In determining this question, the form of the instrument is not conclusive. The instrument may be in the form of a penal bond, and yet its true construction may be that the sum named is the amount which the parties agreed upon as a substitution or compensation for the non-performance of the condition, — as liquidated damages, in other words. But, in the absence of other considerations, the sum named in such a bond is deemed to be a penalty, and therefore only a security.

408. Where a bond is given for the payment of a given sum of money, to be void if the condition set forth is performed, it may be safe to say that the sum thus named will ordinarily be regarded merely as a penalty to secure the performance of the condition, and that upon a breach of the condition, the plaintiff can recover only the amount of damages actually sustained thereby;¹ as, for example, where the condition is for the payment of a promissory note by a day named.

But when the condition is for the performance of something else than the mere payment of money (as to build a house by a certain day), then the question arises, — often a very difficult one, — whether the sum thus stated in the bond is merely in the nature of a penalty, or is the sum which the parties have settled upon as the proper amount for one to pay the other in case the condition is not performed; whether, in short, the sum named is a penalty merely, or is liquidated damages. Now, although the instrument may be in the form of a bond with a penalty, yet, if its purpose was to prescribe a precise sum which one party was to pay to the other under certain circumstances, then it is regarded as liquidated damages.² Upon breach of condition the whole amount is payable, and equity can give no relief.

409. As was said by the court in *Hodges v. King*:³ “The

¹ [*Chaudé v. Shepard*, 122 N. Y. 397; *Thompson v. Whipple*, 5 B. I. 144; 1 *Pomeroy's Eq.* § 433.] ing Co. 125 N. Y. 230; *Smith v. Wedgwood*, 74 Me. 457, and cases cited on p. 219, *infra*.]

² [*Ward v. Hudson River Build-* ³ 7 Met. 583, 588.]

bond has, indeed, a condition, but that is matter of form, and cannot turn that into a penalty which, but for the form, is an agreement to pay a precise sum under certain circumstances." Judge Story says: "In every such case the true test generally, if not universally, by which to ascertain whether relief can or cannot be had in equity, is to consider whether compensation can be made or not. If it cannot be made, then courts of equity will not interfere."¹

This becomes in every case a question of construction for the court, aided by all the circumstances attending the execution of the instrument. Reported cases of this character are very numerous, but it is beyond my province to discuss them. I merely call attention to this distinction, and to the rule that, whenever the proper construction of the instrument is that the sum is liquidated damages, equity cannot interpose.²

410. Where the amount of a penalty is prescribed by law to secure the performance of some specific duty or act required by law, upon a breach the penal sum must be paid,

¹ 2 Story's Eq. § 1314.

² [Where a sum is fixed to become due on breach of the condition, and the damages for such breach would be difficult to ascertain, the sum will be considered as liquidated damages: *Rolfe v. Peterson*, 2 Bro. P. C. 436; *Green v. Price*, 13 M. & W. 695; *Cnshing v. Drew*, 97 Mass. 445; *Wolf Creek Co. v. Schultz*, 71 Pa. St. 180; *Jemmison v. Gray*, 29 Iowa, 537; *Wallis v. Smith*, L. R. 21 Ch. D. 243; *Little v. Banks*, 85 N. Y. 258; *Houghton v. Pattee*, 58 N. H. 326; *Leary v. Liflin*, 101 Mass. 334; *Lynde v. Thompson*, 2 Allen, 456; *Tennessee Manufacturing Co. v. James*, 91 Tenn. 154; *Fasler v. Beard*, 39 Minn. 32. For other cases where various rules have been applied, and the sum has been held to be liquidated damages, see *Trower v. Elder*, 77 Ill. 452; *French v.*

Macale, 2 D. & W. 274; *Parfitt v. Chambre*, L. R. 15 Eq. 36; *Berrickott v. Traphagen*, 39 Wis. 219; *Thompson v. Hudson*, L. R. 4 H. of L. 1; *U. S. Mortgage Co. v. Sperry*, 138 U. S. 313; *Baldwin v. Van Vorst*, 10 N. J. Eq. 577; *Keeble v. Keeble*, 85 Ala. 552. In the following cases the sum was regarded as a penalty: *Hamaker v. Schroers*, 49 Mo. 406; *Kemble v. Farren*, 6 Bing. 141; *Whitfield v. Levy*, 35 N. J. L. 149; *Lyman v. Babcock*, 40 Wis. 503; *Carter v. Strom*, 41 Minn. 522; *Henry v. Davis*, 123 Mass. 345; *Lampman v. Cochran*, 16 N. Y. 275; *Spencer v. Tilden*, 5 Cowen, 144; *Clements v. Railroad Co.* 132 Pa. St. 445. See, also, for a discussion of the various rules by which the courts determine whether a sum is a penalty or liquidated damages, *Pomeroy's Eq. § 435 et seq.*]

and equity can give no relief.¹ This is the common, perhaps the invariable rule.

Chief Justice Taney stated the law upon this point as follows : —

“ The sum for which the parties are to become bound is manifestly a penalty or forfeiture inflicted by the sovereign power for a breach of its laws. It is not a liquidated amount of damages due upon a contract, but a fixed and certain punishment for an offence. And it is not the less a penalty and a punishment because security is taken before the offence is committed, in order to secure the payment of the fine if the law should be violated.”²

(This rule does not apply where a bond is given by a public officer, for instance a city treasurer, for the faithful performance of his duty.)

Relief against Penal Bonds.

411. By the almost universal practice of common-law courts at the present day, adequate relief can be obtained in these cases without resort to a court of equity.³ In a suit upon a penal bond, if the plaintiff recovers (*i. e.* if it is established that there has been a breach of the condition), judgment is still entered in his favor for the full amount of the bond. But the court then proceeds to “ chancery the bond,” that is, it orders an inquiry as to the amount really due, by referring that question to a master, assessor, or jury, and execution issues in favor of the plaintiff only for the just amount thus found to be due.

412. In the Federal courts the proceeding is regulated by the 47th law rule, which provides that the damages are to be assessed by a jury at the request of either party; otherwise by the court, according to the course in equity, and that is, by reference to a master or assessor. In the Public Statutes of Massachusetts⁴ it is provided that, if the plain-

¹ [State v. McBride, 76 Ala. 51 ; v. Barnard, 108 U. S. 436, 453-459. State v. Hall, 70 Miss. 678.]

² United States v. Montell, Taney Dec. 47, 52. See, also, Powell v. Redfield, 4 Blatch. 45 ; Clark

³ [See Pomeroy's Eq. §§ 72, 381, 434.]

⁴ Ch. 171, §§ 9, 10.

tiff in a suit upon a penal bond recovers for a breach of condition, judgment shall be entered for the penal sum, but execution shall issue only for the amount found to be due ; and this amount is determined by the court through an assessor, or, at the request of either party, by a jury.

Forfeiture.

413. It is also a favorite maxim that equity abhors a forfeiture, and will never assist a party to enforce one.¹ This is true, but the instances are not numerous in which equity can undertake to relieve against a forfeiture upon the ground of accident,² or indeed upon any ground except that of fraud, or estoppel amounting to fraud.

414. MORTGAGES. — The first and most important instance of this relief is in the case of mortgages. These constitute too large a subject to be disposed of merely as an illustration, and they will receive careful consideration hereafter. But it will be pertinent to state in this connection the characteristics of a mortgage. A mortgage is a conveyance of property upon the condition subsequent that, if the grantor shall perform the condition by a day named (as, the payment of a certain sum with interest), the deed shall become void, but otherwise it shall remain in full force and effect. Now, at the common law, in accordance with the terms of the deed, if the grantor fails to perform the condition precisely at the time and in the manner specified in the deed, all his contingent right in the estate becomes absolutely forfeited. But in equity the substance of the transaction rather than its form is regarded. It is a mortgage, *i. e.* a mere security for the performance of the condition ; and therefore a court of equity will relieve the mortgagor against the forfeiture of his estate upon his performing the condition.

415. LEASES. — The second and hardly less important instance of relief against forfeiture, on the assumed ground

¹ [Beecher v. Beecher, 43 Conn. 556 ; Palmer v. Ford, 70 Ill. 369 ; Strange, 447 ; Oil Creek R. R. v. Smith v. Jewett, 40 N. H. 530 ; Atlantic, &c. R. R. 57 Pa. St. Craig v. Hukill, 37 W. Va. 520 ; 1 Pomeroy's Eq. § 459.] ² [Peachy v. Duke of Somerset, 1

of accident, is in the case of forfeiture of a lease by the non-payment of rent on the precise day when it is payable. As a general rule, a lease is made conditional on payment of the rent at stated times, and upon failure the lessor reserves the right to enter and terminate the lease for breach of condition. Equity has long exercised the power to relieve a lessee against the forfeiture of his lease upon his paying the full amount of rent due and interest.¹ The ground of this interference is, that the covenant for reëntury upon failure to pay rent was really intended as a security for the payment of the rent, and inasmuch as full compensation can thus be given to the landlord, the lessor, equity will not allow him to enforce the forfeiture.

In *Hill v. Barclay*² Lord Eldon admitted that this rule was well settled in equity, and long acknowledged in that court, but he declared it to be "utterly without foundation." Judge Story dissented from this view (and with him probably most authorities will agree), saying: "It proceeds upon the intelligible principle that the right of reëntury is intended as a mere security."

416. In *Atkins v. Chilson*³ the court held that this power to relieve against a forfeiture could be exercised by a court of law under the following circumstances: The lessee failed to tender the rent due upon the proper quarter day; but he had tendered it three days before, when the lessor had declined to receive it, asserting that the lease had already been forfeited for some other cause. The lessor thereupon, after entry, brought a writ of entry against the lessee to recover the premises, on the ground that the lease had been forfeited by the non-payment of rent at the proper time. But the court, upon the petition of the defendant, ordered a stay of proceedings conditioned upon the lessee's paying to the lessor, or bringing into court for his acceptance, the full amount of rent due with interest. The court held that it was competent for them to grant this relief without compelling

¹ [Sunday Lake Mining Co. v. Wakefield, 72 Wis. 204. See, also, *Giles v. Austin*, 62 N. Y. 486.]
Tibbetts v. Cate, 66 N. H. —. So
 forfeiture for non-payment of taxes

² 18 Ves. 56.

³ 11 Met. 112.

the lessee to go into a court of equity. Indeed, at that time no equitable jurisdiction for such a case existed in Massachusetts.

417. In *Sanborn v. Woodman*¹ the same rule was extended to the case of a grantee in a deed made upon condition that he would indemnify and save harmless the grantor from a preëxisting mortgage laid by the grantor upon the estate. The grantee failing to pay the interest on the mortgage when it became due, the grantor was compelled to pay it, and thereupon he entered upon the estate for breach of condition, and brought his writ of entry. Inasmuch as the covenant was one really for the payment of money, the court relieved the defendant from the forfeiture by staying the proceedings upon his paying the full amount due. This decision was in analogy to that made in *Atkins v. Chilson*, *supra*.

418. *Lilley v. Fifty Associates*² is an interesting case, where the court relieved a tenant against forfeiture on the ground that there was an equitable estoppel arising out of the course of dealing between the parties. In this case there was a lease of land on Cornhill, in Boston, for one thousand years, at the yearly rent of ten tons of the first quality of Russia Old Sables iron, to be delivered on the premises in four equal quarterly payments on the first days of March, June, September, and December. It appeared that for forty years, by agreement between the parties, the rent had been paid in gold. It also appeared that for many years Russia Old Sables iron had not been imported to the United States. On December 12, 1862, the lessors gave notice that they should require the next March payment to be made in iron. The lessees thereupon brought a bill in equity to enjoin the lessors from enforcing a forfeiture of the lease, on the ground that, from the course of dealing between the parties, the lessees were entitled to time in which to send for and obtain the iron. The court held that, under the circumstances, any notice less than three months was not sufficient, and they enjoined the lessors accordingly.

¹ 5 Cush. 36.

Bowen v. Bowen, 20 Conn. 127;

² 101 Mass. 432. [See, also, *Thompson v. Whipple*, 5 R. I. 144.]

*When Time is of the Essence of the Contract.*¹

419. Whenever the payment of money, or the performance of any other act by a certain time, is made an absolute condition, the condition must be performed, or a forfeiture will follow, against which equity cannot relieve.

It is undoubtedly true that, where an agreement provides simply for the payment of money, and a penalty or forfeiture is added, the penalty is commonly considered as "inserted merely to secure the payment of the money"—as simply collateral to the main thing, which is the payment of the money; and therefore, if the money is paid or tendered, although not on the precise day named, the substantial object of the contract is accomplished. But it may be of the very essence of a contract that money shall be paid or something else done on or before a given day; the contract is such that it cannot be satisfied except by punctual performance. In this case equity will not relieve against a forfeiture in the event of non-performance, because to do so would deprive the other party of an essential right,—would in fact defraud him of his contract.²

420. Time may thus become the essence of a contract in two ways,—first, by construction of the court; second, by express agreement. First, from the very nature of the case, it may be apparent that strict performance is required by the intent of the parties. The court will then give that construction to the agreement.³

¹ [Grigg v. Landis, 19 N. J. Eq. 350; s. c. 21 N. J. Eq. 494; Hunkill v. Guffey, 37 W. Va. 425.] Cairns in Tilley v. Thomas, L. R. 3 Ch. App. 61.

² "Time may be made to be of the essence of a contract by express stipulation between the parties, by the nature of the property, or by surrounding circumstances, showing the intention of the parties that the contract was to be completed within a limited time:" Roberts v. Berry, 3 De G., M. & G. 284, 291. This definition was quoted with approval by Lord Justice Klein v. Insurance Co. 104 U. S. 88; Slater v. Emerson, 19 How. 224; Pickering v. Greenwood, 114 Mass. 479; 2 Story's Eq. § 1314, *supra*; Jones v. United States, 96 U. S. 24. [As a rule, time is of the essence when the contract is for personal services: Dunklee v. Adams, 20 Vt. 415. So, also, in regard to contracts for stock subscriptions: Germantown Railway v. Fidler, 60 Pa. St. 124.]

421. Secondly, time may be made essential by express agreement. Whenever, in an agreement providing for the performance of an act by a certain day, it is expressly stated that time shall be of the essence of the contract, then strict performance is absolutely necessary, and equity cannot relieve.¹

422. It is well settled that a court of equity will not relieve against forfeiture of an estate for the breach of any other covenant than a covenant to pay rent, or other definite sum of money,² except upon the ground of fraud or mistake.³ It will relieve in the case of a covenant to pay rent or other definite debt, not only because, as we have seen, a right of reëntry for breach of that covenant is deemed a mere security for the payment of the money, but also because it is in the power of the court to see precisely what damage the creditor has sustained, and to award full compensation therefor, namely, the money due, with interest.⁴ But in the case of covenants as to collateral matters which the lessee or other party may make, one great difficulty is to fix the precise amount of damage which the covenantee has sustained by the breach; and this difficulty, with the consequent liability to do injustice to the covenantee, is one reason, and perhaps the controlling one, why courts of equity refuse relief against forfeiture for breach of any covenant except one for the mere payment of money. Indeed, Judge Story states the rule thus broadly: "The doctrine seems to be now well settled⁵ in England that, in all cases of forfeiture for the breach of any covenant other than a covenant to pay rent

¹ *Stinson v. Dousman*, 20 How. 461, 466; [*Drown v. Ingels*, 3 Wash. St. 424. In a contract to pay premiums upon an insurance policy by a certain day, the policy to become void upon non-payment, time is the essence of the contract: *Knickerbocker Ins. Co. v. Dietz*, 52 Md. 16. See, also, *City Bank v. Smith*, 3 Gill & J. 265.]

² [*Croft v. Goldsmith*, 24 Beav. 312; *Munroe v. Armstrong*, 96 Pa. St. 307.]

³ [*Wing v. Harvey*, 5 De G., M. & G. 265; *Hulett v. Fairbanks*, 40 Ohio St. 233; *Orr v. Zimmerman*, 63 Mo. 72.]

⁴ Relief against foreclosure was granted to a mortgagor who was prevented by accident from paying the money on the day named in a decree of foreclosure: *Kopper v. Dyer*, 59 Vt. 477.

⁵ [The editors of Story have since changed "well settled" to "asserted." See the 13th edition.]

[or other definite debt], no relief ought to be granted in equity, unless upon the ground of accident, mistake, fraud, or surprise, although the breach is capable of a just compensation."¹

It is accordingly settled that equity will grant no relief against the forfeiture of a lease by breach of the lessee's covenant to insure the premises.²

If, however, the omission was caused by innocent mistake, and no injury has resulted, equity will relieve against the forfeiture on the ground of mistake.³

423. Nor will equity relieve in case of a breach of covenant to repair the premises, even although the neglect to repair was accidental, not wilful.⁴ And the same is true in the case of a covenant to cultivate the premises in a "husbandlike manner."⁵

424. If, however, the failure to perform a covenant arises from an "act of God," and not from the neglect of the party, no forfeiture ensues. Thus, in *Merrill v. Emery*⁶ a legacy was given by the testator to his wife upon condition "that she educate and bring up my granddaughter." The wife died seven days after the testator. The court held that the terms of the bequest implied personal care by the legatee, the wife, and that the duty terminated with her life, and so in effect that the condition was performed.

In *Parker v. Parker*⁷ there was a bequest upon a similar condition, but there the person to be supported died in the lifetime of the testator. The performance of the condition thus became impossible by the act of God, and the legatee was accordingly held entitled to the estate discharged of the condition.

These were not strictly cases of covenant, but they illus-

¹ 2 Story's Eq. § 1323.

² *Green v. Bridges*, 4 Sim. 96.

³ *Mactier v. Osborn*, 146 Mass. 399. In this case the policy was taken out, but, by mistake, it had been made to a mortgagee instead of to the lessor. See the cases cited in *Klein v. Insurance Co.* 104 U. S. 88, *supra*.

⁴ See *Gregory v. Wilson*, 9 Hare, 683. [For a case where equity granted relief for breach of a covenant to repair, see *Hagar v. Buck*, 44 Vt. 285.]

⁵ *Hills v. Rowland*, 4 De G., M & G. 430.

⁶ 10 Pick. 577.

⁷ 123 Mass. 584.

trate the principle; the legatees took the gift upon the implied covenant that they would perform the condition attached to the gift.

Diminution of Assets in Hands of Executor.

425. Another important class of cases for relief in equity on the score of accident is where the assets of an estate have diminished in the hands of an executor without his fault, as by fire, theft, or other casualty, or by sudden depreciation in the value of property, so that they prove insufficient to pay the debts of the estate. At common law the rule is very rigid that an executor cannot plead such diminution in exoneration of himself.

The rule was thus stated by Lord Ellenborough in *Grosse v. Smith*:¹ "As no case at law has yet decided that an executor, once become fully responsible by actual receipt of a part of his testator's property for the due administration thereof, can found his discharge in respect thereof, as against a creditor seeking satisfaction out of the testator's assets, either on the score of inevitable accident, — as destruction by fire, loss by robbery, or the like, or reasonable confidence disappointed, or loss by any of the various means which afford excuse to ordinary agents and bailees in cases of loss without any negligence on their part; I say, as no such case in respect to executors has yet occurred in a court of law, we are not, from the particular hardship of the present case, authorized to make such a precedent in favor of this defendant."

426. What, then, in the absence of a statutory provision, is the remedy in such a case? It is relief in equity against the claim on the ground of accident; on the ground, namely, that without the fault of the executor, by an unforeseen occurrence not imputable to his negligence or misconduct, the assets which came to his hands have been lost, or so diminished that he has no fund for the payment of debts. No more just appeal could be made to a court of chancery, and its right to relieve in such a case is well settled in England.²

¹ 7 East, 246, 258.

See, also, *Clough v. Bond*, 3 Myl. &

² 1 Story's Eq. § 90, cases cited. Cr. 490, and cases cited in opinion

427. An executor will be relieved against loss by fluctuations in the three per cents or other authorized investments.¹

We have seen that a trustee is held responsible only for reasonable skill and prudence in making investments; and if, having exercised these, a loss ensues, he is not personally liable. A similar rule of exemption should apply to an executor, especially where the loss is due to extraneous causes, as fire, theft, or embezzlement.

The rule, as I have said, is well settled in England. I do not find that the question has ever arisen in Massachusetts.

It is provided by statute,² however, that an executor or administrator shall "sustain no loss by the decrease or destruction without his fault" of the assets of the estate. But if the loss occurred after the expiration of a year, and when he is liable to the suit of creditors, a resort to equity might be necessary to enjoin such suit, unless it should be held that the loss would be a good defence at law, like the plea of *plene administravit*.

428. Sickness and death, where the personal service of the party is the subject of the contract, are accidents, against the consequences of which, equity, so far as necessary, will grant relief. But it is difficult to suppose a case where the intervention of a court of chancery would be necessary, because the excuse of sickness or death for the non-performance of a personal contract is in most cases equally available at law, these misfortunes being considered as the "act of God."

Accidents not Relievable.

429. We come now to consider a few cases by way of illustration where, although an accidental loss or misfortune has occurred, equity does not grant relief.

Where the parties have made a definite contract, equity will not relieve against its consequences because it has be-

and notes; [*Croft v. Lyndsey*, Fre. Ch. 1; *Stevens v. Gage*, 55 N. H. 175.]

¹ 2 Williams on Executors, 1705 and notes, 9th ed.

² Mass. Pub. Stat. ch. 144, § 3. And see *Fuller v. Connelly*, 143 Mass. 227.

come less profitable or more onerous on account of some contingency against which the contract did not provide.

A court of chancery cannot make a new contract for parties. It often happens that one party or another to an agreement may truly say, "If I had exercised more foresight, if I had thought of this or that as likely to happen, I would have guarded against it, or shaped my agreement accordingly." But courts of chancery cannot after the event make the agreement conform to what the party would have desired or required if he had anticipated the event, although the unfortunate occurrence was a mere accident, not imputable to the negligence or fault of either party.

430. A striking illustration of this rule is found in the case of a tenant who has covenanted to keep in good repair, or to pay full rent during the term, or both, but has made no exception in case of the destruction of the building by fire. It was settled (at law) very early in Massachusetts that such accidental destruction of the premises did not release the tenant from the covenants in his lease to repair, or to pay rent.¹

And the rule in equity is the same.² To graft such an exception on the lease would be to make a new contract for the parties. And, hard as the case may be, the court can only say that the parties must stand by their contract as they chose to make it.

431. The same rule applies where there is a contract to build upon the land of another, and before the building is completed it is destroyed by fire or other accident, not the "act of God." Equity cannot relieve against such accidents. The party must fulfil his contract. "If a party by his con-

¹ *Fowler v. Bott*, 6 Mass. 63; on his contract: *Drake v. White*, Phillips *v. Stevens*, 16 Mass. 238. 117 Mass. 10. One who hired a

² *Holtzapffel v. Baker*, 18 Ves. 115; *Pym v. Blackburn*, 3 Ves. 34; *Dermott v. Jones*, 2 Wall. 1. A creditor agreed in writing to return a sofa deposited with him as collateral security, or its equivalent in money. The sofa having been destroyed by fire, he was held liable for its value

piano agreed to return it "in as good order as when received, customary wear and tear excepted." The lessee's house blew over, and the piano was injured. The lessee was held liable for the injury: *Harvey v. Murray*, 136 Mass. 377; [*Gates v. Green*, 4 Paige, 355.]

tract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great [or unforeseen accidents, however disastrous], will not excuse him. . . . Under such circumstances equity cannot interpose.”¹

The distinction stated in an early case, and frequently applied, is this: Where a duty is created by law, the party will be excused from performing it if disabled without his own fault. But the rule is otherwise where the duty is created by his own agreement.²

432. A company agreed to build a bridge in a substantial manner and to keep it in repair for a certain number of years. A flood carried it away. It was held that the company were bound to rebuild.³ In one case, where there was a contract to build upon the soil of another, the house sank, owing to a latent defect in the soil, the walls cracked, and the dwelling became uninhabitable. New artificial foundations were necessary, and the structure had to be rebuilt in part. It was held that the builder was not excused by the circumstances from fulfilling his contract. The cases just stated were suits at law, but they are cited and approved in *Dermott v. Jones*, *supra*, and the court there say: “Under such circumstances equity cannot interpose.”

¹ *Dermott v. Jones*, 2 Wall. 1, 7. See, also, *Adams v. Nichols*, 19 Pick. 275.

² “The distinction is now well settled between an obligation or duty imposed by law and that created by covenant or act of the party. When the law creates a duty, and the party is disabled from performing it without any default of his own, the law will excuse him; as in waste to a tenement, if the same be destroyed

by tempest or enemies, the lessee is excused. But when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.” *Shaw, C. J.*, in *Mill Dam Foundry v. Hovey*, 21 Pick. 417, 441.

³ *Brecknock Co. v. Pritchard*, 6 T. R. 750.

CHAPTER XVI.

MISTAKE.

433. THE next subject in natural order is that of mistake, and it is one of some difficulty.

The distinction between Mistake and Accident (which I have just considered) is manifest and important. "Mistake" has reference to a state of things existing at the time when the contract or other transaction in question was made or took place. "Accident" refers to some event which occurs subsequently to the transaction. "Mistake," as has been said, is essentially subjective; it indicates a mental condition of one or both of the parties concerned. "Accident" is objective; it relates to facts wholly external to the parties. Mistakes, then, affect the quality or character of the transaction itself; whereas accident introduces some modification in the remedy which would otherwise be available, or gives rise to some particular claim for relief.¹

434. It is almost hopeless to attempt a definition of mistake which shall not be at the same time both too narrow and too broad; that is, which will not exclude some cases which should be included, and include others which ought to be excluded.

Judge Story defined it as "some unintentional act or omission or error, arising from ignorance, surprise, imposition, or misplaced confidence."² But this definition is obnoxious to the criticism that it includes some matters which, according to any scientific division of the subject, have no place under the head of mistake. I mean all errors "arising from imposition or misplaced confidence." Undue influence, imposition, the abuse of confidence, all constitute actual fraud, — fraud in its worst form, — and they belong to that head exclu-

¹ Smith's Principles of Equity, p. 198. ² 1 Story's Eq. § 110.

sively. Judge Story himself, when he comes to discuss the subject, does not follow his own definition, but refers all matters of imposition and abused confidence to the appropriate head of fraud.

In treating of mistake as a branch of equity jurisdiction, it is therefore important to eliminate from our minds any ideas of fraud as the basis of the relief. This branch of equity concerns cases exclusively where there was no fraud, but where the injury which is sought to be redressed resulted from the innocent mistake of one or both of the parties. Where mistake has been induced by the fraud of the other party, then fraud must be the basis of relief.

435. With so eminent an example of failure before me, it is very presumptuous, as well as perilous, to attempt any definition, but I have framed the following, which may be of some assistance:—

Mistake is (1) excusable ignorance of some material matter of law or fact by which a party has been led to part with some right or to assume some obligation, or (2) it is an accidental error or omission in a written instrument whereby the instrument fails to express the actual agreement of the parties.

My definition, it will be perceived, is twofold, and such is the true character of the subject. First, the error is one under the influence of which a party has entered into a contract or other transaction (*i. e.* he has parted with some right or assumed some obligation) which he would not have done but for the mistake under which he acted. In this class of mistakes the proper relief to be given by the court is to declare that the transaction shall not be binding, and to annul it altogether.

The second branch of the definition covers those cases where a perfect agreement has been made between the parties, but where some error or omission has occurred in reducing it to writing. Here the proper redress, obviously, is not to annul the contract, but to make the written instrument conform to the actual agreement of the parties. The function of the court in this latter case is not to relieve the parties from a contract which they have mistakenly made,

but to give force and effect to their actual contract by making the written embodiment conform to it.

Mistakes are either mistakes of law or of fact, and first as to

Mistake of Law.

436. It is a fundamental maxim in all jurisprudence that "ignorance of the law excuses no one,"—*ignorantia juris neminem excusat*. This principle we have derived from the Roman law, and it is one from which, as a general rule, there is no departure. It is not exclusively confined to the administration of the criminal code, but, with very limited exceptions, it is equally applicable to every system of law by which civil rights are determined and protected. It is, as a general proposition, as true of equity as of the common law, that ignorance of the law is no excuse, and affords no ground for relief.¹

A few cases have occurred (to some of which I shall refer later) in which equity granted relief on the ground of mistake in law. These are exceptional in their character, and are not always reconcilable on principle with numerous decisions made the other way by the same courts.

Lord Justice Turner in *Stone v. Godfrey*² said: "This court has power . . . to relieve against mistakes in law as well as against mistakes in fact." But this was an *obiter dictum*. The tendency of all modern decisions is to exclude mistake in law as ground for relief in equity, except under very special circumstances.

437. One of the earliest cases upon this point is *Pusey v. Desbouvrie*.³ The daughter of a freeman of London accepted a legacy left her by her father, when, by the custom of London, she was entitled either to the legacy or to her "orphanage" share in her father's estate. She was informed of this, but she did not know that she was by law entitled to inquire into the value of the personal estate and

¹ [Allen v. Galoway, 30 Fed. Rep. Y. 57; Midland, &c. Co. v. Johnson, 466; Peters v. Florence, 38 Pa. St. 6 H. L. C. 798.]
 194; Cartwright v. Dickinson, 88 ² 5 De Gex, M. & G. 76, 90.
 Tenn. 476; Carpenter v. Jones, 44 ³ 3 P. Wms. 315.
 Md. 625; Jacobs v. Morange, 47 N.

the amount of her orphanage part, and, being ignorant of this fact, she elected to accept the legacy rather than the orphanage. Her release of the orphanage was set aside as being made under a mistake of law.

Another case is that of *Lansdowne v. Lansdowne*.¹ Here a dispute arose between an uncle and his nephew as to the right of inheritance to the estate of a deceased brother and uncle. The question of law was referred by them to the village schoolmaster, who (as a matter of course) advised them incorrectly concerning their legal rights. Thereupon a division of the estate was made between them not in accordance with the legal rights of the nephew, and subsequently he sought to have the division set aside upon the ground of his mistake of law. Lord Chancellor King set the division aside; but the authority of this case has uniformly been denied.

In *Bingham v. Bingham*² the plaintiff was devisee of an estate. The defendant had claimed it on the ground that he was the heir in tail, and that the testator had no authority to devise it. The plaintiff, being erroneously advised that such was the law, paid the defendant a sum of money for the estate. Afterward, ascertaining his mistake, he brought a bill in equity to recover the money which he had paid, and the bill was sustained. The soundness of this decision, also, has frequently been questioned; but in a modern case, which I am about to state, Lord Chancellor Cranworth, referring to *Bingham v. Bingham*, said that in his opinion "the doctrine there acted upon was perfectly correct doctrine."

This remark was made in *Cooper v. Phibbs*.³ In that case the plaintiff had accepted from the defendant the lease of a valuable salmon fishery for a term of years, covenanting to pay a large rent. In point of fact the plaintiff himself was the owner of the fishery, and he had been led to suppose that the defendant was the owner, through ignorance or misunderstanding of the legal effect of certain private acts of Parliament. This suit was brought to set the lease aside, and the House of Lords decreed for the plaintiff.

¹ 2 Jac. & W. 205.

³ L. R. 2 H. L. 149.

² 1 Ves. Sr. 126.

Lord Westbury, after reviewing the facts, said (page 170): "The result therefore is that, at the time of the agreement for the lease which it is the object of this petition to set aside, the parties dealt with one another under a mutual mistake as to their respective rights. . . . In such a state of things there can be no doubt of the rule of a court of equity with regard to the dealing with that agreement. It is said, *ignorantia juris haud excusat*; but in that maxim the word *jus* is used in the sense of denoting general law, the ordinary law of the country. But when the word *jus* is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact. It may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake. Now that was the case with these parties,—the respondents believed themselves to be entitled to the property; the petitioner believed that he was a stranger to it; the mistake is discovered, and the agreement cannot stand."¹

438. In each of the preceding cases, it is to be observed that the plaintiff was ignorant of the fact that he himself had a title to the property. But this ignorance was due to his ignorance or misapprehension of the law affecting his rights in the case. The immediate mistake, so to say, was as to the fact of ownership, although this mistake in turn was caused by a mistake as to the law governing the case. This, perhaps, furnishes the true test as to when equity will relieve in case of a mistake in law. It will relieve when the mistake of law has led a party into a mistake of fact concerning his title to the property.² In the case just stated Lord Westbury speaks of this ignorance of title as a mistake of fact. Such seems to have been the criterion adopted

¹ See, also, *Hogan v. Wixted*, 138 Mass. 270.

² [*Baker v. Massey*, 50 Iowa, 399; *Griffith v. Townley*, 69 Mo. 13; *Freeman v. Curtis*, 51 Me. 140; *Mack-*

net v. Macknet, 29 N. J. Eq. 54; *Blakeman v. Blakeman*, 39 Conn. 320; 2 Pomeroy's Eq. § 849. But see *Hamblin v. Bishop*, 41 Fed. Rep. 74.]

by Lord Eldon in the case of *Stockley v. Stockley*,¹ and Judge Story also approves it.²

439. As to mere naked mistakes in law (*jus*, as defined by Lord Westbury) the more correct proposition is, that they are not remediable in equity.³ The exceptions to this rule will be found "few in number, and to have something peculiar in their character, and to involve other elements of decision."⁴

I repeat, then, the modern doctrine upon the subject is that, as a general rule, mistakes in law are not remediable in equity. A few leading illustrations will be sufficient to give a correct idea of the scope of this doctrine. A mistake of law by which one person has discharged another from some legal liability is not remediable in equity.⁵ One of the earliest and most common illustrations of this rule is the case of a holder of a bond who discharges one of two joint obligors under the mistake of law that the other obligor will remain bound.⁶

440. Money paid by one person to another under no mistake of fact, but under a mistake of law, is not recoverable in equity any more than at law.⁷ A leading case is that of *Bank of United States v. Daniel*.⁸ In this case a foreign bill of exchange had been protested for non-payment, and when a new note was given in settlement of the claim, the holder (the bank) asserted in good faith that, under the statute of Kentucky, which was supposed to govern the case, it was entitled to ten per cent. damages (a sum of one thousand dollars) in addition to the amount

¹ 1 Ves. & Bea. 23.

² 1 Story's Eq. § 130.

³ [See the cases cited *supra*, p. 233, and in 2 Pomeroy's Eq. § 842.]

⁴ Hunt v. Rousmanière, 1 Peters, 1, 15; Bank of the United States v. Daniel, 12 Pet. 32, 55. [For such an exceptional case see Benson v. Markoe, 37 Minn. 30; Kyle v. Fehley, 81 Wis. 67; and 2 Pomeroy's Eq. § 847 *et seq.*]

⁵ [Weed v. Weed, 94 N. Y. 243;

Thurmond v. Clark, 47 Ga. 500; Garwood v. Eldridge, 2 N. J. Eq. 145.]

⁶ See the cases cited in 1 Story Eq. § 112.

⁷ [Long v. Long, 30 Ill. App. 559; Price v. Estill, 87 Mo. 378; Shriver v. Garrison, 30 W. Va. 456; McWhinney v. City of Logansport, 132 Ind. 9; Clarke v. Dutcher, 9 Cow. 674; Bilbie v. Lumley, 2 East, 469.]

⁸ 12 Peters, 32, 56.

shown on the face of the bill. The maker acquiesced in this view, and gave his note for the whole sum, including the one thousand dollars, and he paid the note at maturity. Ascertaining afterward that the holder was not entitled by law to the one thousand dollars damages, he brought this bill to correct the mistake and to recover the money paid. But the court refused relief, saying: "Testing the case by the principle that a mistake or ignorance of the law forms no ground of relief from contracts fairly entered into with a full knowledge of the facts, and under circumstances repelling all presumptions of fraud, imposition, or undue advantage having been taken of the party, none of which are chargeable upon the appellants in this case, the question then is, were the complainants entitled to relief? To which we respond decidedly in the negative."

Another case is that of *Rogers v. Ingham*.¹ An executor, acting under the advice of counsel as to the construction of the will, proposed to distribute a fund between two legatees in certain proportions. One of the legatees, being dissatisfied, took the opinion of counsel, which agreed with the former opinion. The executor then divided the fund between the two legatees, who accepted the same and gave releases. Subsequently the dissatisfied legatee filed a bill against the executor and the other legatee, alleging that the will had been construed wrongly, and claiming repayment from the other legatee. The Lords Justices, affirming the decision of the Vice-Chancellor, held that the bill could not be maintained. They laid it down in the most emphatic manner that money paid under mistake of law, but under no mistake of fact, cannot be recovered; and they declared that the rule upon this subject is the same in courts of chancery as in courts of common law.

441. MISTAKE OF LAW.—AN EXCEPTION.—In England an important exception has been established to the rule that equity cannot relieve in the case of money paid under a mistake of law. In this country the point has not arisen. That exception may be stated thus: Where money has been paid under a mistake of law to one who is an officer or trus

¹ L. R. 3 Ch. D. 351.

tee of the court under pending proceedings, it can be recovered in a court of equity. There are two cases. The first was *Ex parte James*.¹ In this case a debtor had been adjudicated a bankrupt. An execution creditor had received from the sheriff the proceeds of the sale of some of his goods on execution. The trustee in bankruptcy asserted that he was entitled to the proceeds, and under a mistake of law the creditor paid them over to him. The Court of Appeals held that the creditor was entitled to recover them.

Lord Justice James said: "With regard to the point that the money was voluntarily paid to the trustee under a mistake of law and not of fact, I think that the principle that money paid under a mistake of law cannot be recovered must not be pressed too far, and there are several cases in which the Court of Chancery has held itself not bound strictly by it. I am of opinion that a trustee in bankruptcy is an officer of the court. . . . The court, then, finding that he has in his hands money which in equity belongs to some one else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people."

The other case, *Dixon v. Brown*,² is as follows: A trustee under a will, who was also one of the beneficiaries, became bankrupt, having expended certain funds belonging to the trust. Subsequently other funds were received by his successor in the trust, and his share of them was paid over to his assignee in bankruptcy, — whereas in law it ought to have been retained to make good his deficiency as trustee. The court held, following *Ex parte James*, *supra*, that as the money was paid under a mistake of law to the assignee in bankruptcy, who was an officer of the Court of Bankruptcy, it should be recovered, and this although he was not an officer of the Court of Chancery.³

442. Whenever a written instrument conforms to the actual agreement of the parties, although it has been entered

¹ L. R. 9 Ch. App. 609.

² L. R. 32 Ch. D. 597.

³ [See, also, *In re Opera* [1891], 2 Ch. 154.]

into under a mistake as to its legal effect, equity will not correct the mistake.¹

You will observe that in this case the instrument has taken the precise form which the parties intended that it should take; but, owing to misapprehension of the law, their agreement does not have the legal effect which they supposed it would have. In other words, if they had understood the law correctly, they would have made an agreement different from that which they did make.

In these cases equity withholds relief, and upon this principle: equity never makes a new contract for parties. It will annul a contract where it would be unconscionable to hold one or both of the parties to it. It will correct the instrument so that it shall conform to the real agreement, but under no circumstances will it undertake to make a new or different contract for the parties.

443. The leading case in this country is that of *Hunt v. Rousmanière*.² A debtor proposed to give his creditor an interest in some personal property by way of security. The form of security was discussed between them,—whether it should be a mortgage or something else. Under advice of counsel, the creditor chose a power of attorney to himself to sell the property and apply the proceeds in payment of the debt, and accordingly the power was given. Before a sale of the property could be made the debtor died, and the power of attorney was thereby in law annulled and cancelled, so that the creditor's security was gone. The creditor then brought this bill against the administrator of the debtor to have the security reformed into a chattel mortgage, inasmuch as it was made under a mistake of law, neither party having been aware that the power of attorney would cease upon the death of the debtor. Relief was denied. The court held that the security given was in the precise form which the parties had selected; the fact that it had ceased to operate was owing to their mistake of law as to

¹ [Caldwell v. Depew, 40 Minn. 528; Kelly v. Turner, 74 Ala. 513; 124.]

² 1 Peters, 1, 14-17.

the legal effect of a power of attorney; and such a mistake could not be corrected.

The court say: "If, then, the agreement was not founded in a mistake of any material fact, and if it was executed in strict conformity with itself, we think it would be unprecedented for a court of equity to decree another security to be given, not only different from that which had been agreed upon, but one which had been deliberately considered and rejected by the party now asking for relief. . . . Equity may compel parties to perform their agreements, . . . but it has no power to make agreements for parties, and then compel them to execute the same. . . . Where the parties, upon deliberation and advice, reject one species of security and agree to select another under a misapprehension of the law as to the nature of the security so selected, a court of equity will not, on the ground of such misapprehension and the insufficiency of such security, in consequence of a subsequent event not foreseen perhaps or thought of, direct a new security of a different character to be given, or decree that to be done which the parties supposed would have been effected by the instrument which was finally agreed upon."

444. This, however, was no new doctrine. In the early case of *Irnham v. Child*,¹ in a deed granting an annuity a clause was first inserted containing a power of redemption. Afterward this was stricken out by the parties upon the mistake, in law, that the clause would make the transaction usurious. The Court of Chancery refused to restore the clause, or to grant relief.

Lord Eldon, in commenting on this case in *Marquis of Townshend v. Stangroom*,² said that it "went upon an indisputably clear principle that the parties did not mean to insert in the agreement a provision for redemption, because they were all of one mind that it would be usurious; and they desired the court, not to do what they intended, for the insertion of that provision was directly contrary to their intention, but they desired to be put in the same situation as if they had been better informed, and consequently had a contrary intention."

¹ 1 Brown Ch. R. 92.

² 6 Ves. 328, 332.

445. Another illustration is where a party, in making a voluntary deed of settlement, omits to insert in the instrument a power of revocation, under the erroneous belief that he is at liberty to revoke it without the insertion of a power to that effect. Equity cannot correct this mistake. The instrument was made as it was intended to be made.¹ But if the party had intended to insert the clause, and it had been omitted by mistake, equity would of course correct the mistake.

Mistake of Fact.

446. Where one has been led to part with a right or to assume an obligation by excusable ignorance of a material fact, equity will give relief.² The ignorance must be excusable. If it be the result of gross negligence, or if it relate to some matter which the party was under a legal obligation to know, equity will not relieve.³

The United States Supreme Court stated the rule as follows: "Mistake, to be available in equity, must not have arisen from negligence where the means of knowledge were easily accessible. The party complaining must have exercised at least the degree of diligence which may be fairly expected from a reasonable person."⁴

447. But, subject to these exceptions, equity takes cognizance of the truth that, according to the common experience of mankind, facts and circumstances important to a particular transaction are not always within the knowledge or recollection of the parties concerned. Equity imposes upon no one the duty to know everything or to recollect everything.

The mistaken fact must be material; that is, it must

¹ [Worrall v. Jacob, 3 Meriv. Cas. in Chan. 256, 270; Viney v. Abbott, 109 Mass. 300; Sewall v. Roberts, 115 Mass. 262; Kerr on Fraud and Mistake, p. 429, Bump's ed.]

² [Snyder v. Partridge, 138 Ill. 173; Baxter v. Tanner, 35 W. Va. 60.]

³ [Dnke of Beaufort v. Neeld, 12 Cl. & F. 248; Durkee v. Durkee, 59 Vt. 70; Voorhis v. Murphy, 26 N.

J. Eq. 434; Pearce v. Suggs, 85 Tenn. 724. Ordinarily it is negligence to sign a deed without reading it: Roundy v. Kent, 75 Iowa, 662. But there may be cases where such failure to read the deed would not bar relief: Kinney v. Ensminger, 87 Ala. 340; Palmer v. Hartford Ins. Co. 54 Conn. 488.]

⁴ Grymes v. Sanders, 93 U. S. 53. 61.

affect the substance of the contract, and be one of the inducements leading the party either to engage in or to abstain from the transaction.¹ In the case just cited the Supreme Court explain the rule upon this point: "The fact [mistaken] must be such that it animated and controlled the conduct of the party. It must go to the essence of the object in view, and not be merely incidental. The court must be satisfied that but for the mistake the complainant would not have assumed the obligation from which he seeks to be relieved."

448. Judge Story puts as a familiar instance the case of the sale, for a gross sum, of an estate well known to both parties, each party supposing that it contains twenty acres, whereas in fact it contains nineteen acres and a fraction. The difference would not ordinarily be considered so material in equity as to be ground for rescinding the contract.² On the other hand, if the sale was made under the common mistake that the vendor had an unquestionable title, and it turns out, owing to some fact then unknown, that the vendor had no title, because, for instance, there is a nearer heir living who was supposed to be dead, — here the mistake is clearly as to a material fact.³ So it would be a material mistake if the vendee should purchase land for a particular purpose disclosed to the vendor, and it should prove that the land, being less in quantity than the parties supposed, was unsuitable for that purpose.

449. It is of course impossible to anticipate all the cases in which a court of equity would act on the ground of mistake in fact, nor would it be useful or practicable to attempt to enumerate all the instances in which this jurisdiction has been exercised. A few examples will serve to illustrate the doctrine of equity upon the subject.

¹ [Stone v. Godfrey, 5 De Gex, M. & G. 76, 90; Dambmann v. Schulting, 75 N. Y. 55; Segur v. Tingley, 11 Conn. 134. So equity will not correct a mistake where the instrument could not be enforced when corrected: Daggett v. Ayer, 65 N. H. 82; Thompson v. Phoenix Ins. Co. 136 U. S. 287, 296; Olson v. Erickson, 42 Minn. 440.]

² [For a case where the difference was held to be material, see *Paine v. Upton*, 87 N. Y. 327.]

³ 1 Story's Eq. § 141.

FAILURE OF TITLE. — Where the title of a vendor fails on account of some fact unknown to the parties, equity will relieve by rescinding the contract, provided there is no adequate remedy at law. The aid of a court of equity could seldom be needed on account of the failure of a vendor's title. In all sales of personal estate there is an implied warranty of title by the vendor, and if it turns out that the vendor had no title, the law rescinds the contract, and the vendee has a perfect remedy by an action either for breach of the warranty, or to get back the price paid. There is no necessity in this case of going into equity either to rescind the contract or to recover the price paid.

450. In conveyances of real estate there is usually a covenant of warranty of title, and if the grantor had no title the grantee has a perfect remedy by an action at law on the warranty for damages. Equity could do no more for him. But let us suppose another very common case where the deed contains no covenant of warranty, but is simply a quitclaim deed, *i. e.* a simple conveyance of such title and interest as the grantor may have, without warranty that he has any title at all. In this case, if it proves that the grantor had no title whatever, no action at law will lie in behalf of the grantee to recover the amount paid, or for breach of any covenant, because no covenant was made. The vendee purchased at his own risk. Nor would there be any remedy in equity.

But now let us add another element to the case. Let us suppose, in the case of a quitclaim deed, that the grantor was believed by himself and by the grantee to be the only son and heir of the former owner of the estate, and that, acting upon this belief the grantee buys the estate from him, and takes merely a quitclaim deed. It turns out that there is an older son and heir, or that the grantor was not the son of the former owner, and so had no title whatever. Here the conveyance was made under such a mistake of fact as calls for equitable relief.

451. The next instance is where the subject of the contract, without the knowledge of the purchaser, has ceased to exist; or at the time of the bargain its condition had materi-

ally changed from what it was then supposed and assumed to be.¹

If, for example, the sale was of a life estate, and the person for whose life the estate was granted had died at the time of the bargain, and that fact was unknown to both parties, a court of equity would rescind the contract upon the ground of mutual mistake as to the fact which constituted the basis of the contract.

Or, if the subject of sale was a house or other personal property (a cargo at sea, for instance) which had ceased to exist at the time of the bargain, there was such mistake of fact as will afford ground for rescinding the contract.²

Again, where a person having a claim on a foreign government, and, not knowing that it had been allowed, contracted to pay an agent a large percentage in consideration that he would bring the claim to a favorable issue, the agreement was ordered to be cancelled on the ground of mistake.³

452. CHANGE IN THE PROPERTY.—So, also, in the case of a contract for the purchase and sale of real estate consisting of land and a house, if at the time of the bargain the house had been consumed by fire, unknown to the parties, this would be such a mistake of fact as would in equity rescind the contract.⁴ It would so be held even at common law, and the vendee would be entitled to recover his purchase-money if he had paid it.

453. Wherever a supposed fact constituting the basis of the contract, or the sole inducement to the contract, has no existence, although the parties believe it to exist, equity will rescind the contract.⁵ Thus, where a remainder-man made an agreement with the assignee of the holder of the life estate that the assignee should have the same right to the

¹ [Mays v. Dwight, 82 Pa. St. 462; Hitchcock v. Giddings, 4 Price, 135; Rheel v. Hicks, 25 N. Y. 289. So where an insurance policy was issued on a man's life, the man being dead at the time, the policy was held void: Riegel v. Insurance Company, 140 Pa. St. 193.]

² Couturier v. Hastie, 5 H. L. C. 673.

³ Allen v. Hammond, 11 Peters, 63.

⁴ Wells v. Calnan, 107 Mass. 514.

⁵ [Fitzmaurice v. Mosier, 116 Ind. 363.]

timber as if he had actually cut it, on a past day named, the assignee agreeing to cut no more timber for a month, and it turned out that the life-tenant was dead at the date of this agreement, the court held that the agreement was founded on a mistake of fact.¹ The rule is the same where a person, in ignorance of his own title, has agreed to buy or to hire an estate which is already his own.²

454. Where the parties act under a mistake as to what is bought and sold, the vendor supposing that he is selling one thing and the buyer supposing that he is buying another, — this is a mistake of fact, on account of which equity will rescind the contract. For instance, where, in a bargain for real estate, the vendor intends to sell only one lot, and the purchaser understands that he is buying two lots, equity will rescind the contract because of the mistake. This was settled in the early case of *Calverley v. Williams*,³ in which Lord Chancellor Eldon said: “No doubt if one party thought he had purchased *bonâ fide*, and the other party thought he had not sold, that is a ground to set aside the contract, that neither party may be damaged; as it is impossible to say one shall be forced to give that price for part only, which he intended to give for the whole, or that the other shall be obliged to sell the whole for what he intended to be the price of part only.”

455. No ignorance or mistake of either party as to any fact which affects merely the value of the subject-matter of the contract (its identity being preserved, and no change in its condition having taken place) is ground for relief. It may turn out to be worth much less than the vendee anticipated, or much more than the vendor supposed, but in the absence of fraud neither mistake furnishes ground for rescinding the contract.

In all transactions of bargain and sale, either of real or personal estate, as a general rule each party has a right to act upon his own private knowledge of any facts affecting the value of the property, and he is not bound to disclose

¹ *Cochrane v. Willis*, L. R. 1 Ch. L. 149; *Jones v. Clifford*, L. R. 3 App. 58.

² *Cooper v. Phibbs*, L. R. 2 H. ³ 1 Ves. 210.

those facts to the other party. Wherever the duty of disclosure exists (and this will be considered under the head of fraud) a different rule applies. But so far as our present topic is concerned, it is sufficient to say that the mere relation of buyer and seller does not impose upon either the duty of disclosing to the other any facts within his private knowledge affecting merely the value of the property. No ignorance, therefore, of any such fact can be a ground either in equity or at law for rescinding the contract.

Two illustrations will suffice: A privately ascertains that there is a valuable mine on the land of B, of which B is ignorant, and he buys the estate at a price based merely on its value as farm land. Here A was under no legal obligation to disclose his private information to B, and the latter's ignorance of a fact affecting only the intrinsic value of his property is not such a mistake as a court of equity can rectify. It was thus laid down by Lord Thurlow in *Fox v. Mackreth*.¹

456. So, on the other hand, where a vendor has private information as to some extrinsic facts which, if known, would reduce the price of his goods in the market, and he sells them at a high price to a vendee who is ignorant of those facts, equity cannot relieve, because there was no duty of disclosure; as, for instance, where a vendor knew that peace had been concluded between Great Britain and this country, and failed to communicate the information to his vendee.²

So, if the owner of shares in a stock company knew of certain facts which diminished their value, but nevertheless sold them at the regular market price to a vendee not so well informed, there would be no relief, although it should turn out that, owing to these extrinsic circumstances (such as loss of the company's property or increase of its debts), the shares were worthless.

No mere ignorance of any facts affecting the value of the article sold, although they are known to the other party, will render the contract invalid.

¹ 2 Brown's Ch. Rep. 400, 420.

² *Laidlaw v. Organ*, 2 Wheat. 178.

CHAPTER XVII.

MISTAKE (CONTINUED).

457. WE come now to the second branch of our definition of mistake, namely, that it is an accidental error or omission in a written instrument on account of which the instrument fails to express the actual agreement of the parties.

Thus far we have been concerned with cases where, on account of some mistake, equity will relieve the parties by annulling their agreements. We are now to consider, first, those cases where it will lend its aid to perfect and enforce contracts which the parties intended to make, and, secondly, certain cases where the relief is necessary to cancel the instrument.

The general proposition is well settled that whenever a written instrument, by the mistake of the parties, fails to express their real agreement, equity will correct the mistake.¹

458. First, the mistake must be that of both parties; both parties must have understood the agreement alike, and the instrument must fail to express that common understanding and intention.² Equity will never reform an instrument so as to carry out the idea of one party contrary to the idea of the other party. It will never reform a contract upon proof of mistake by one of the parties only, as to its terms or legal effect, for to do so would be to commit the injustice

¹ *Hunt v. Rousmanière*, 1 Peters, Minn. 511; *Haack v. Weicken*, 118 N. Y. 67; *Born v. Schrenkeisen*, 107 Mass. 290, 319; s. c. 110 N. Y. 55.]
² [Morris v. Penrose, 38 N. J. Eq. 102 Mass. 45; *Canedy v. Marcy*, 629; *Bates v. Bates*, 56 Mich. 405; 13 Gray, 373; 1 Story's Eq. § 115; *Page v. Higgins*, 150 Mass. 27; [Thompson v. Phoenix Insurance Company, 136 U. S. 287; *Clem v. Hamlon v. Sullivant*, 11 Ill. App. 423; *Andrews v. Andrews*, 81 Me. App. 666; *Talley v. Courtney*, 1 Heisk. 715; *Rice v. Kelset*, 42

of imposing upon the other a contract to which he had never assented.

The court must first be satisfied that there was a complete concurrence of minds between the two as to what the agreement should be. In other words, equity will never rectify an instrument unless it is satisfied that both parties originally understood the contract alike.¹

459. If the fact of a definite, well-understood agreement is established, it does not impair the right to rectification that one of the parties was aware that the written instrument did not properly embody it. Indeed, this consideration only aggravates the wrong, for it introduces an element of fraud, and entitles the other party all the more to the relief sought. For if one party to the contract knows that the instrument contains an error, although he may not actively have caused it, he is guilty of bad faith toward the other in allowing him to execute the instrument under a misapprehension.²

When, therefore, it is said that, in order to justify a court of equity in correcting a written instrument, it is necessary that the mistake must be mutual, there is great danger of misapprehension. This does not necessarily mean that both parties should be mistaken as to what the written instrument is; it may mean this when both parties are acting innocently and in good faith. But although one may understand perfectly what the written instrument is, yet if it be clear that both understood the agreement alike, and the writing fails to express that agreement, then it will be reformed.

460. Equity will also grant relief to a limited extent in cases of unilateral mistake; that is, where the instrument conforms to the understanding which one of the parties had as to what their contract was, but not to the understanding of the other. This is really the case where there has been no consensus, no meeting of two minds: one thinks he is

¹ *Sawyer v. Hovey*, 3 Allen, 331; 131 Mass. 316; *Hearne v. Marine Stockbridge Iron Co. v. Hudson Insurance Co.* 20 Wall. 488.

Iron Co. 102 Mass. 45; *German-American Insurance Co. v. Davis*, ² [Roszell v. Roszell, 109 Ind. 354; Welles v. Yates, 44 N. Y. 525; *Wilians v. Huyck*, 71 Iowa, 459.]

making one bargain and the other thinks that he is making a very different bargain, and consequently no contract results. In this case the written instrument, as signed by both, expresses the intention of one, but not the intention of the other. Under these circumstances equity will grant relief by cancelling the instrument, upon the ground that no contract has been made by the parties. It cannot reform the instrument so as to make it conform to the idea of one of them, because the effect of that would be to force upon the other a contract which he never intended to make. Observe, then, that the relief to be granted in such cases is to annul the instrument altogether, because there has been no common understanding of the parties, and it would be inequitable to hold either to a contract which he never intended to make.¹

461. Equity can qualify this relief in one instance. If either party prefers that the instrument should be reformed so as to express the understanding of the other party, rather than to have it annulled altogether, equity will at his election grant this relief.²

Thus in *Preston v. Luck*,³ where the agreement was for the sale of certain patents, the vendee asserted that it included foreign as well as English patents, but the vendor maintained that it included only the English patents. The vendee was willing, however, to accept the other's construction, and the court held that he was entitled to performance accordingly.

462. WHAT UNILATERAL MISTAKES EQUITY WILL RELIEVE. — It is impossible to state any very definite proposition upon this subject, or one which will accurately define the limits which courts of equity have prescribed to themselves in reference to this class of cases.

In *Tamplin v. James*⁴ Lord Justice James said: "Perhaps some of the cases on this subject go too far, but for the most part the cases where a defendant has escaped on the

¹ [Dulany v. Rogers, 50 Md. 524 ; ² Paget v. Marshall, L. R. 28 Ch. De Voin v. De Voin, 76 Wis. 66. D. 255.]

See *supra*, p. 11.]

³ L. R. 27 Ch. D. 497.

⁴ L. R. 15 Ch. D. 215, 221.

ground of a mistake not contributed to by the plaintiff have been cases where a hardship amounting to injustice would have been inflicted upon him by holding him to his bargain, and it was unreasonable to hold him to it."

This is not very definite, although the learned judge was not apt to err in the direction of vagueness. The trouble is inherent in the subject itself, and each case must depend chiefly upon its own circumstances. But I think we can extract from the cases one or two landmarks.

463. Where it is made clear that a party has by mistake included in a deed more than he intended to convey, equity will relieve by annulling the deed.

A leading case is *Harris v. Pepperell*,¹ where a grantor included in his deed a parcel of land which he did not intend to sell. In this case option was given to the purchaser to have the deed rectified or annulled.

In *Paget v. Marshall*² a lessor had included in a lease some premises which he did not intend to let. Vice-Chancellor Bacon said: "If the court is satisfied that the true intention of one of the parties was to do one thing, and he by mistake has signed an agreement to do another, that agreement will not be enforced against him, but the parties will be restored to their original position, and the agreement will be treated as if it had never been entered into."

In *Garrard v. Frankel*³ the consideration in a written lease was erroneously put at one hundred and thirty pounds, whereas the lessor intended that it should be two hundred and thirty pounds. The court held that the lease must be rescinded, unless the lessee elected to take it at the correct rent.

So in *Webster v. Cecil*,⁴ where the defendant, through a mistake in addition, offered to sell at one thousand two hundred and fifty pounds, instead of two thousand five hundred pounds. Specific performance against him was refused. Lord Justice James approved this case in *Tamplin v. James*, *supra*, adding that it did not go far enough.

¹ L. R. 5 Eq. C. 1. See, also, *Calverley v. Williams*, 1 Ves. 210.

² 30 Beav. 445.

⁴ 30 Beav. 62.

³ L. R. 28 Ch. D. 255.

464. So, where a purchaser has been misled (though not intentionally) as to the identity or extent of the estate described in the deed, it not being what he supposed that he was buying, he will be relieved from accepting the deed.¹ The same principle was applied in a suit at law by the vendor to recover the price of the land.²

465. But here it is important to observe that the mistaking party must have exercised that reasonable care which courts of equity require in all cases of alleged mistake. When the mistake as to the subject-matter or terms of the transaction arises from the gross negligence of the party seeking relief, equity will not relieve.³

Thus, where a purchaser at an auction utterly neglected to read the description or to examine the plans referred to by the auctioneer, which were full and accurate, his mistake was held to be inexcusable.⁴

Lord Justice James said: "If a man will not take reasonable care to ascertain what he is buying, he must take the consequences." Brett, J., said: "It was a mistake into which he was led solely by his not taking reasonable care."

In *McKenzie v. Hesketh*⁵ the plaintiff had offered in writing to take the lease of a farm, specifying the closes, at five hundred pounds per annum. The defendant's agent, without examining the description in the plaintiff's letter, accepted the offer, supposing that it was for a less number of closes, one of the closes specified having already been let. The court held that the plaintiff was entitled to a lease of the remaining closes at a reduced proportionate rent, basing their decision upon the negligence of the defendant's agent.

466. Whenever one party seeks to take advantage of what he must have known was a mistake, although he did not contribute to it, equity will be quick to relieve.⁶

¹ *Spurr v. Benedict*, 99 Mass. 463.

² *Kyle v. Kavanagh*, 103 Mass. 356. See, also, *Earle v. De Witt*, 6 Allen, 520.

³ [*Serrell v. Rothstein*, 49 N. J. Eq. 385.]

⁴ *Tamplin v. James*, L. R. 15 Ch. D. 215.

⁵ L. R. 7 Ch. D. 675.

⁶ *Webster v. Cecil*, 30 Beav. 62; *Tamplin v. James*, *supra*; [*Keister v. Myers*, 115 Ind. 312.]

467. When one party simply mistakes the legal construction or effect of an instrument, the terms of which have definitely been agreed upon, equity will not relieve him.¹ There can be no doubt about this proposition when its limits are understood. Where an instrument is written just as the parties agreed that it should be, and afterward they differ as to its legal construction or effect, that is simply a question of law for the court to settle. If either party could say, "I understood the agreement differently, and therefore it must be annulled or changed," the effect of this would be to annul every agreement upon which either party attempted to fasten a meaning not justified by law.

468. All the errors or mistakes which we have been considering, and for which equity grants relief, are those where some substantive matter has been either accidentally omitted or included.

In *Powell v. Smith*² the court decreed specific performance of an agreement for a lease although the lessor misunderstood the legal effect of the terms of the agreement. Romilly, Master of the Rolls, said: "All the cases cited are cases where there was either a dispute and doubt as to the thing sold, or where the words of the agreement expressed certain things in an ambiguous manner which might be misunderstood by one of the parties. . . . But here the words of the agreement are quite certain, and the only thing that was not understood was the legal effect of certain words which it contained. Now that is no ground of mistake at all. It is a question upon the construction of an agreement agreed to by everybody concerned."

In *German-American Insurance Co. v. Davis*³ it was held that, even where the parties understood the preceding oral agreement differently, yet when they have deliberately reduced it to writing they are both bound by the terms of the written instrument, and it must be construed by the court.

¹ [Wood v. Price, 46 Ill. 439; v. Shipley, 2 Md. 25; Lanning v. Gerald v. Elley, 45 Iowa, 322; Nor- Carpenter, 48 N. Y. 408.]
ris v. Laberee, 58 Me. 260; Kelly

² L. R. 14 Eq. 85.

v. Turner, 74 Ala. 513; McElderry

³ 131 Mass. 316.

Mistakes in Written Agreements.

469. First as to matters of substance. The mistake may consist either (1) in inserting what ought to have been excluded, or (2) in omitting what ought to have been included, or (3) in drafting the entire agreement so that it has a different legal effect from what the parties intended, and thus fails to carry out their agreement. One or two cases to each point will be cited.

470. MISTAKE BY INSERTION. — Whenever a conveyance covers more than the agreement, equity will correct it by striking out the excess.¹

A leading case is that of *Stockbridge Iron Co. v. Hudson Iron Co.*² In this case the claim was that, in a conveyance of certain iron-ore mines, a right was reserved to the grantor contrary to the contract of the parties.³ In *Harris v. Pepperell*⁴ a deed covered two lots, whereas by the real agreement it should have conveyed but one lot. The court corrected the mistake. In *Elliott v. Sackett*⁵ the deed erroneously contained a covenant that the grantee should assume and pay a subsisting mortgage.⁶ In *Canedy v. Marcy*⁷ the agreement was for the conveyance of two thirds of an estate. By mistake the entire interest was conveyed by the deed. The court reformed it. In *North American Insurance Co. v. Whipple*⁸ a policy of insurance was made for one year and two months, whereas it should have been for two months only. The court corrected the mistake after a loss had occurred.

This rule was also very properly extended to a case where in a writ of entry the question of title was submitted to the court upon an agreed statement of facts, but by a mistake in the description of the premises a lot was included which ought not to have been included. The mistake was discov-

¹ [Conlin v. Masecar, 80 Mich. 139; Fowler v. Vreeland, 44 N. J. Eq. 268.]

² 107 Mass. 290.

³ [Lear v. Prather, 89 Ky. 501.]

⁴ L. R. 5 Equity Cas. 1.

⁵ 108 U. S. 132.

⁶ [Adams v. Wheeler, 122 Ind. 251.]

⁷ 13 Gray, 373.

⁸ 2 Bissell, 418.

ered too late to give the party a remedy by review, and equity accordingly gave relief, by enjoining the adverse party from enforcing the judgment as to the lot which was included by mistake.¹

471. MISTAKE BY OMISSION. — This occurs whenever any material provision of the contract has been omitted,² or, in case of a deed, whenever it fails to cover all that the agreement requires.

In *Rumrill v. Shay*³ we have the converse of the mistake which was the ground of relief in *Harris v. Pepperell*, *supra*. Here the agreement was for the conveyance of two lots, but the deed covered only one. In *Sampson v. Mudge*⁴ the deed conveyed only a life estate to the grantee, whereas the agreement was for a fee simple. Judge Lowell held that the mistake was apparent on the face of the deed, and that it might be corrected upon evidence furnished by the deed itself.

Whenever there is a misdescription of the premises in a deed, giving either too much or too little, and the mistake is properly established, equity will correct it.⁵

In *re Boulter*⁶ the mortgage should have included three houses, but included only one.

472. MISTAKE AS TO LEGAL EFFECT. — Where an instrument fails to express the real agreement of the parties, although this failure is owing to a mistake of law in drafting it, equity will correct the mistake.⁷

It is important to observe the difference between this proposition and that established in *Hunt v. Rousmanière*,⁸ already considered. There it was decided that, the parties having deliberately settled upon one form of instrument rather than another, equity could not interfere, although the instrument had a legal effect different from what they intended, that being a bald mistake of law. In that case

¹ *Currier v. Esty*, 110 Mass. 536.

⁶ L. R. 4 Ch. D. 241.

² [*Gump's Appeal*, 65 Pa. St. 476.]

⁷ [*Abraham v. North German Ins. Co.* 40 Fed. Rep. 717; *Pitcher v. Hennessey*, 48 N. Y. 415; *Wintermute v. Snyder*, 3 N. J. Eq. 489.]

³ 110 Mass. 170.

⁴ 13 Fed. Rep. 260.

⁵ *May v. Adams*, 58 Vt. 74. [See, also, *Germania, &c. Co. v. Gueck*, 130 Ill. 345.]

⁸ 1 Pet. 1, *supra*, p. 239.

the form which the agreement should take was of the very essence of the contract, and the parties selected a power of attorney rather than a mortgage.

But we are now considering the case where the parties have made a certain agreement, but by mistake of the scrivener, either in fact or in law, the formal instrument is such that it fails to carry out the intention of the parties. There is a clear and important although nice distinction between the two cases. In the first case the very form of the instrument was the subject of deliberation, selection, and agreement; it constituted of itself the ultimate agreement. The parties practically said, "We do not want a personal mortgage, but we do want a power of attorney." The parties therefore must be bound by it.

In the second case, a definite oral agreement was made, but when the scrivener attempted to reduce it to writing he failed to do so, and his failure may have been through ignorance of the law in supposing that the form in which he put it would carry out the intention of the parties.¹

473. The United States Supreme Court in *Hunt v. Roussanière*, *supra*, recognized and pointed out this very distinction in these emphatic words:² "There are certain principles of equity applicable to this question which, as general principles, we hold to be incontrovertible. The first is, that, where an instrument is drawn and executed which professes or is intended to carry into execution an agreement, whether in writing or by parol, previously entered into, but which by mistake of the draftsman, either as to fact or law, does not fulfil or which violates the manifest intention of the parties to the agreement, equity will correct the mistake so as to produce a conformity of the instrument to the agreement."

For instance, the agreement is for the sale in fee simple of an estate. The scrivener in drawing the deed ignorantly or carelessly omits the word "heirs," so that in form the

¹ [*Pitcher v. Hennessey*, 48 N. Y. 415; *Kennard v. George*, 44 N. H. 440; *McMillan v. Fish*, 29 N. J. Eq. 610; *Corrigan v. Tiernay*, 100 Mo. 276; *Cake v. Peet*, 49 Conn. 501. For a case where this principle was carried to a great length, see *Lant's Appeal*, 95 Pa. St. 279.]

² 1 Pet. 1, 12.

deed only conveys a life estate. Here is a clear case of mistake for which equity will afford relief, although the mistake may have been occasioned by ignorance of the law.¹

474. Or suppose that, under an agreement between an insurance company and A as the agent of B, the company have agreed to insure B's ship or cargo, but by mistake the policy runs to A, omitting the expression "agent," or "for whom it may concern." Upon proof of the agreement, there should be no doubt that equity would reform the policy, although it may have been drawn as it was under the mistake of law that it would cover B's interest in that form.

This precise case occurred in *Oliver v. Mutual Commercial Insurance Co.*² The oral agreement was for insurance by an agent to cover the interest of his principal in a certain ship, but by mistake the policy did not run to the agent *eo nomine*, nor to "whom it might concern," so that in form it did not cover the principal's interest at all. It was contended in behalf of the insurance company that this was a mistake of law and not of fact in drafting the instrument, and therefore that it could not be corrected, and *Hunt v. Rousmanière* was relied upon. Mr. Justice Curtis, in discussing this point said (p. 298): "It is true, as settled by the Supreme Court in *Hunt v. Rousmanière*, that the inquiry in all these cases must be, not how the parties intended or expected an instrument to operate, but what they intended it to be. But there is a wide distinction between a case where an instrument is what the parties agreed it should be, but its legal effect is unexpected, and a case where an instrument was designed to carry into effect an existing binding agreement, but by mistake fails to do so. In the former case the party never had a right to anything more than he has got. He may be disappointed in finding that what he acquired was less valuable than he expected, but he acquired all he bargained for, and there is no ground upon which a court of equity can give him anything more. On the contrary, in the latter case the party had a complete right, by an existing contract, to something which by mistake he has failed to get. And this

¹ *Sampson v. Mudge*, 13 Fed. Rep. 260, *supra*. ² 2 Curtis, C. C. R. 277.

contract, and the right under it, still subsists in point of equity, because, though the parties attempted to execute the contract, by mistake they failed to execute it; and therefore a court of equity interposes, and, upon the footing of an existing contract, unexecuted, proceeds to put the party in that condition to which his contract entitles him. And in this class of cases I apprehend it is wholly immaterial whether the party has failed to obtain that to which he was entitled through a mistake of fact or of law."

The same point was decided in *Snell v. Insurance Co.*¹

475. Where an instrument originally correct has been altered innocently by one of the parties under a mistake of fact, equity will correct the alteration so that the instrument shall stand as originally written.

The importance of this relief is obvious when you consider that the general rule of law is, that any alteration of a written instrument made by one party, without the consent of the other, avoids it absolutely as to him, so that he is no longer bound by it. It is very hard, however, that an alteration innocently made should have this fatal effect, and equity, therefore, will correct the mistake.

But it is indispensable to this rule that the alteration should have been made innocently, *i. e.* with no fraudulent intent, and in the honest belief that the party making the alteration was exercising a legal right. It is no small thing for one party to a written instrument to alter it behind the back of the other, and therefore a case of innocent mistake must be shown, or equity will not interfere.²

*Nickerson v. Swett*³ affords an illustration. A note had been given by a maker, with surety, payable at a certain rate of interest. The agent of the holder, having been informed that the agreement was that if the note was not paid at maturity the rate of interest was thereafter to be increased, wrote a memorandum to that effect on the body of the note. The surety brought a bill to have the note cancelled as against him on account of this alteration, and the holder brought a bill to have the mistake corrected, inas-

¹ 98 U. S. 85.

³ 135 Mass. 514.

² See the cases, *infra*.

much as it was made innocently and with an intent to state the contract correctly. The latter appeared to be the case, and the court very properly dismissed the bill of the surety, and gave the holder the relief prayed for.

476. Whenever a security is surrendered, under the erroneous idea that the debt has been paid, equity will restore the creditor to his rights by cancelling the release, or by restoring the security, as the case may be. For example, if a mortgage has been discharged under the mistaken supposition that the debt has been paid, equity will cancel the discharge and order the mortgage to stand as a subsisting security.¹

There is only one exception to this rule. If the debtor in the mean time has conveyed the estate to a *bonâ fide* purchaser without notice, the mortgage is of course inoperative as to him and all others claiming under him.

477. Two important qualifications affecting the general subject remain to be stated.

Equity will never add to a written instrument any provision which was not embraced in the original agreement, although such agreement was omitted from the negotiation by the forgetfulness of one or both of the parties.² This is, perhaps, only to repeat that equity will never make a new contract for the parties.

478. Nor will it relieve a party from such a written contract on the ground that the omission makes the bargain a hard one, or one which would not have been made, if the party had contemplated a particular contingency. For example, a lessee accepts a lease by which he agrees to pay rent, and to restore the premises at the end of the term in good order and condition. During the negotiation no suggestion was made as to what should be done in case of fire, and no provision was made in the lease for that contingency. Now, equity cannot add to the lease a provision exempting the lessee in case of fire from restoring the premises in good order and condition, on the ground that, if this contingency had been thought of, he would probably have insisted upon

¹ Bruce v. Bonney, 12 Gray, 107.

² [Stiles v. Willis, 66 Md. 552.]

such a provision. The law is well settled to this effect.¹ Equity will never make a new contract in order to meet contingencies which the parties themselves did not contemplate or provide for.

479. The second qualification is, that where the provision has intentionally been omitted from the written instrument, one party choosing to rely upon the oral promise of the other, equity will never supply it on the ground of mistake.² In *Andrew v. Spur*³ it was contended that the grantor orally reserved a right to standing timber, but intentionally omitted it from the deed on a parol agreement by the grantee to the same effect. It was held that a bill would not lie to correct the deed.

Mistake of Form in Written Agreements.

480. This branch of our subject may be dismissed with a very brief consideration. If equity will not hesitate, under proper circumstances, to correct mistakes in substance, *à fortiori* will it prevent injustice being done by mere clerical errors made in drafting an instrument.⁴

In his headnote to *Findlay v. Hinde*⁵ Mr. Justice Curtis thus stated the rule of the United States Supreme Court upon this subject: "If a deed . . . lacks some legal formality to pass the legal title," equity will correct the mistake.

If a seal has been omitted it will be supplied.⁶ The word "dollars" will be inserted when it has obviously been omitted by mistake.⁷ So equity will cause an indorsement to be made upon a note, in order to transfer the title, when the indorsement has been omitted by mistake.⁸ But it is unnecessary to multiply instances upon so obvious a point.

¹ *Pym v. Blackburn*, 3 Ves. 34; *Holtzapffel v. Baker*, 18 Ves. 115; *Dermott v. Jones*, 2 Wall. 1. ⁶ *Bernard's Township v. Stebbins*, 109 U. S. 341; *Rutland v. Paige*, 24 Vt. 181; *Bullock v. Whipp*, 15 R. I. 195. [Even though the consideration be not a valuable one: *Conover v. Brown*, 49 N. J. Eq. 156.]

² [*Irnham v. Child*, 1 Bro. Ch. 92; *Stevens v. Cooper*, 1 Johns. Ch. 425; *Ware v. Cowles*, 24 Ala. 446.] ⁷ *Newcomer v. Kline*, 11 G. & J. 457.

³ 8 Allen, 412. ⁸ *Hodge v. Cole*, 140 Mass. 116.
⁴ [*Collins v. Cornwell*, 131 Ind. 20.]

⁵ 1 Peters, 242.

What Testimony is Admissible in Cases of Mistake.

481. It is now settled beyond controversy that, as a general rule, parol testimony is competent in equity to prove mistakes in written instruments.¹

482. The converse of the rule is as well settled at law, namely, that oral testimony is not admissible to vary or control a written instrument. Nor is such testimony admissible in equity any more than at law, except where the issue in the case is whether such mistake exists, and the pleadings raise that precise issue.

483. An important exception to this rule has been asserted by some courts to exist, namely, that where the correction sought to be made in an instrument consists in adding to it something of which, by the statute of frauds, there must be evidence in writing, — in all such cases oral evidence is inadmissible to prove the addition. The statute of frauds requires that all conveyances of real estate, and all agreements relating thereto, shall be in writing. Now, it is said that if the alleged mistake consists in omitting from a deed a lot of land which ought to have been included, the original agreement and mistake must be shown by writing; otherwise you are making oral proof stand in the place of the written instrument which the statute of frauds expressly requires.

There is much force in this objection, but the matter need not be discussed here, for it belongs more properly to the subject of evidence. I will confine myself to mentioning a few of the chief cases on the point. It was broadly stated by Chancellor Kent in *Gillespie v. Moon*,² without any limitation, that oral evidence is always admissible in courts of equity to prove mistakes in written instruments. And the rule has very frequently been stated in the same broad terms by courts and writers of the highest authority. In *Canedy v. Marcy*³ Chief Justice Shaw cited with approval

¹ *Walden v. Skinner*, 101 U. S. 577, 583; *Gillespie v. Moon*, 2 Johns. Ch. 585, 596; *Canedy v. Marcy*, 13 Gray, 373; 1 Story's Equity, § 156, 13th ed.; 2 Taylor's Evidence, p. 1041, 8th ed.; 1 Greenleaf's Evidence, § 296 a, 15th ed.
² 2 Johns. Ch. 596, *supra*.
³ *Supra*.

the rule just quoted; and in *Ivinson v. Hutton*¹ Mr. Justice Clifford stated without qualification that "parol proof is admissible to prove the alleged accident or mistake which is set up as the ground of relief," but the statute of frauds was not involved in that case. In *Walden v. Skinner*² the court referred to this question without deciding it, inasmuch as it was unnecessary to the decision of that case.

In *re Boulter*³ Vice-Chancellor Bacon held that parol evidence was competent to show a mistake in a mortgage by which the instrument was made to include only one house instead of three houses; that the statute of frauds interposed no objection; and that the point was too clear for discussion.

In *Glass v. Hulbert*⁴ this very question arose, and it is fully and ably discussed in the opinion of the court, where also the cases are reviewed. The bill was brought by the grantee of a deed to have it corrected, *inter alia*, by adding thereto a tract of land which, he alleged, was omitted from it by mistake. His only evidence of the alleged original agreement (that the tract should have been included) was in parol and not in writing. The court held that the mistake and the agreement could not be shown by oral testimony, inasmuch as to do so would contravene the statute of frauds.

484. In Massachusetts therefore it is now settled that if the proposed reformation of an instrument includes adding anything which is within the terms of the statute of frauds, the original agreement must be proved by writing, and oral evidence is not competent for that purpose.⁵ This doctrine is doubted by Judge Lowell in *Sampson v. Mudge*,⁶ and by Mr. Pomeroy.⁷ The contrary decision by an English vice-chancellor has already been stated.

¹ 98 U. S. 79, 82, *supra*.

² 101 U. S. 577.

³ L. R. 4 Ch. D. 241.

⁴ 102 Mass. 24.

⁵ [*Elder v. Elder*, 10 Me. 80; *Climer v. Hovey*, 15 Mich. 18. So, it was held that an executory contract for the sale of land could not be added to by parol evidence, but

the court said that such addition might be made where the contract had been executed: *Davis v. Ely*, 104 N. C. 16. See, also, *Petes v. Hambach*, 48 Wis. 443.]

⁶ 13 Fed. Rep. 260.

⁷ 2 Pomeroy's Eq. § 867; [*Noel v. Gill*, 84 Ky. 241; *Dod v. Paul*, 43 N. J. Eq. 302; *Hitchins v. Pettin-*

485. This rule excluding oral evidence when the attempt is to add to a deed does not apply where the alleged mistake consists in including too much, and the object is to narrow the deed. In *Glass v. Hulbert*, *supra*, the court concede that oral evidence is admissible to prove such a mistake, and they cite with approval *Canedy v. Marcy*,¹ where that precise point was decided.

We may therefore assume it to be law in Massachusetts, as well as elsewhere, that when the alleged mistake is that the deed contains a greater interest in real estate than the original agreement justifies, such agreement may be shown by parol.

486. QUANTITY OF EVIDENCE. — In order to establish mistake in a written instrument, the proof must be very clear and satisfactory.² The ordinary rule as to evidence in civil cases does not apply. The principle was thus stated in *Stockbridge Iron Co. v. Hudson Iron Co.*:³ “The proof . . . must be made beyond a reasonable doubt, and so as to overcome the strong presumption, arising from the signatures and seals [of the parties], that the contrary was the fact. . . . The ordinary rule of evidence in civil actions, that a fact must be proved by a preponderance of evidence, did not apply to such a case as this; that the proof [of mistake] must be made beyond a reasonable doubt;” and that this was “such a degree of proof as the jury would act upon in the most important affairs of life, and as would satisfy their judgments and consciences of the fact to be proved.”

In *Oliver v. Mutual Commercial Insurance Co.*⁴ Mr. Justice Curtis said that the proof must be “entirely satisfactory;” and such undoubtedly is the general rule. The evidence must “leave no reasonable doubt” was the expression used in *Hearne v. Marine Insurance Co.*⁵

gill, 58 N. H. 386; McDonald v. Fed. Rep. 862; Harding v. Long, Yungbluth, 46 Fed. Rep. 836; 103 N. C. 1.]

Lockwood v. White, 65 Vt. 466.]

³ 107 Mass. 290, 316.

¹ 13 Gray, 373.

⁴ 2 Curtis C. C. R. 277, 295.

² [Turner v. Shaw, 96 Mo. 22; Hutchinson v. Ainsworth, 73 Cal. 452; Milligan v. Pleasants, 74 Md. 8; Harrison v. Hartford Ins. Co., 30

⁵ 20 Wall. 488. See, also, Snell v. Ins. Co. 98 U. S. 85; [Muller v. Rhuman, 62 Ga. 332; Devereux v. Sun Fire Office, 51 Hun, 147

Mistake as to Foreign Law.

487. The law of any other State of the United States, or of any foreign country, is a fact to be proved, and a mistake as to such law is a mistake of fact and not of law.¹

Whenever, therefore, parties make a contract under a misapprehension of the law of some other State or country, that is a mistake as to a fact, for which equity will give relief. The courts of one State do not take judicial notice of the laws of any other State, unless by virtue of some express statute. But they must take notice of the laws of the United States, because they are the supreme law of the land, and the Federal courts take judicial notice of the laws of the several States.²

Diligence Essential to Relief.

488. Whenever a party discovers a mistake, it is his duty to apply promptly for relief; his mere delay may constitute an absolute bar.³ The maxim of the law that its remedies are for the vigilant, and not for the dilatory, never applies with more strictness than when a party calls upon the court to exercise this extraordinary power of altering or annulling a written instrument. Especially is this true where the contract relates to property of an uncertain or fluctuating value, or where the delay may lead to a material change in the situation of the parties.⁴

The rule is stated and the authorities are cited in *Grymes v. Sanders*:⁵ "Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If

Contra, *Sonthard v. Curley*, 134 N. Y. 148.]

¹ *Sampson v. Mudge*, 13 Fed. Rep. 260; [*King v. Doolittle*, 1 Head, 77; *Bank v. Dodge*, 8 Barb. 233; *McCormick v. Garnett*, 5 De Gex, M. & G. 278; *Haven v. Foster*, 9 Pick. 112.]

² *Hanley v. Donoghue*, 116 U. S. 1, 6.

³ [*Susquehanna Ins. Co. v. Swank*,

102 Pa. St. 17. See *infra*, p. 512. So, also, if the mistake resulted from the negligence of the party who subsequently applies for relief: *Conner v. Welch*, 51 Wis. 431; *Toops v. Snyder*, 70 Ind. 554; *Bonney v. Stoughton*, 122 Ill. 536.]

⁴ [*Thomas v. Bartow*, 48 N. Y. 193.]

⁵ 93 U. S. 55, 62.

he be silent and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. . . . Delay and vacillation are fatal to the right which had before subsisted. These remarks are peculiarly applicable to speculative property, . . . which is liable to large and constant fluctuations in value."

Equity will not rectify a contract after a judgment at law upon it has been rendered.¹

489. *Canedy v. Marcy*² is an instance where delay was excused on the ground that the plaintiff had seasonably given notice of his claim, and had been led by the defendant to suppose that the defendant would yield to it.

Mistakes in Wills.

490. It only remains to state that the doctrine which I have been discussing has no application to the case of wills. No court can lay its hand upon a will, either to add to it or take from it. It must stand as it was left by the testator; and this applies to matters of form as well as of substance. The formal execution of a will is a vital part of it. In Massachusetts, for example, where three witnesses are required to a will, if only two have signed it the will is void. In those States where a seal is made essential to a will, its omission would be equally fatal.

As I have said, the court can never add a new clause to a will, or strike out any, upon the ground that there was a mistake in expressing the testator's intention.³ The only help which the court can give to a will is by way of construction. Reading the will by the light of surrounding circumstances, it can determine what the testator meant by the language which he has used. But this is merely giving effect to the will as it is written.

¹ *Caird v. Moss*, L. R. 33 Ch. D. 22. [But equity will, of course, rectify a fully executed contract: *Paine v. Upton*, 87 N. Y. 327. To what extent equity will rectify a judgment, see *Chapman v. Hurd*, 67 Ill. 234; *Gump's Appeal*, 65 Pa. St. 476.]

² 13 Gray, 373.

³ [*Goode v. Goode*, 22 Mo. 518; *McAllister v. Butterfield*, 31 Ind. 25; *Chambers v. Watson*, 56 Iowa, 676; *Albert v. Albert*, 74 Md. 526.]

491. A latent ambiguity may be explained. For example, a devise is made "to my nephew John Smith," whereas the testator had no nephew of that name, but did have one named Joseph Smith. For the purpose of proving whom the testator meant by the designation which he employed in his will, it is competent to show that he had such a nephew, that he was attached to him, and any other facts tending to prove that he was the intended object of the testator's bounty. So, where a wrong name has been given to a charitable society, similar proof is admissible, not for the purpose of establishing a different devise or bequest from that which the testator has made, but for the purpose of showing for whom in fact the gift was designed, and thus giving effect to the will.¹

492. In all these and in similar instances the court is merely giving a meaning to the instrument as it is written. Its inquiry is, what did the testator mean by the language which he used? And having ascertained that meaning, it merely gives effect to it.²

But where the will gives two acres of land or ten thousand dollars to A, it is not competent to show that this was a mistake in the writing, and that the testator really intended to give A but one acre or five thousand instead of ten thousand dollars, or intended to omit him altogether from the will.

As I have stated, the whole function of a court of equity in dealing with a will is simply and exclusively to take the instrument as the testator left it, and construe it in the light of all the attendant circumstances.³

¹ *Minot v. Boston Asylum*, 7 Met. 416; *Winslow v. Cummings*, 3 Cush. 358; *Bodman v. American Tract Society*, 9 Allen, 447.

² [*Wood v. White*, 32 Me. 340; *Faulkner v. National Sailors' Home*, 155 Mass. 458. So, equity will correct a mistake apparent on the face of the will, which can be corrected without resort to extrinsic evidence: *Snyder v. Warbasse*, 11 N. J.

Eq. 463, where the word "dollars" had been omitted; *Campbell v. Bouskell*, 27 Beav. 325, where "afore-said" had erroneously been inserted; *Grant v. Dyer*, 2 Dow. 73, where "or" had been used in place of "and."]

³ For a case of construction, see *Mellor v. Daintree*, L. R. 33 Ch. D. 198. [See, further, 2 Pomeroy's Eq. § 871.]

CHAPTER XVIII.

ACTUAL FRAUD.

493. It has been said by eminent judges ¹ that an action for deceit is a common-law action, and that it must be decided upon the same principles whether the suit be tried in a court of chancery or of common law; that is to say, that the fraud necessary to support the action in one court is equally necessary in the other.

This is true of what may strictly be called a technical action for deceit, but there is undoubtedly a large and very important class of cases to which equitable considerations apply, and in reference to which the standard adopted by a court of equity is much higher and more exacting than that ordinarily applied at common law.² This is particularly true of cases where relief is granted on the ground of undue influence.³

Moreover, no one familiar with the subject can deny that the relief which a court of chancery is competent to furnish in many cases of fraud is vastly superior to that which is to be had at law, and that its peculiar jurisdiction thus becomes a most efficient and beneficent means of justice.

The subject resolves itself into two general inquiries: 1. What constitutes fraud? 2. What are the limits of equity jurisdiction in cases of fraud, *i. e.* of what cases of fraud will courts of equity take jurisdiction?

494. WHAT IS FRAUD?—Fraud is either actual or constructive. Actual fraud consists in the false affirmation or the wrongful concealment of some material fact, or the doing

¹ As by Lord Justice Cotton in *Arkwright v. Newbold*, L. R. 17 Ch. D. 301, 320; and by Lord Blackburn in *Smith v. Chadwick*, L. R. 9 App. Cas. 187, 193. ² *Arkwright v. Newbold*, L. R. 17 Ch. D. 301, 317, *supra*. ³ *Allcard v. Skinner*, L. R. 36 Ch. D. 145.

of some act, with intent to deceive, whereby another is misled to his injury.

It may be subdivided into (1) misrepresentation, (2) concealment, (3) abuse of confidence and undue influence; or (1) fraudulent statement, (2) fraudulent silence, and (3) fraudulent conduct.

Misrepresentation.

495. Misrepresentation consists in the false statement of a material fact.

In the first place, there must be the assertion of some fact,¹ in distinction from the mere expression of an opinion,² or a simple representation as to the quality or value of the thing sold.³ Mere praise of an article, mere "puffing," give no right of action. To all representations of this sort the rule *caveat emptor* applies.

496. The following classification, although it may not exhaust the subject, will indicate the true distinction between matters of fact and of opinion: The false assertion of any past fact affecting the value of the property in question is a misrepresentation. Thus, if the vendor of land states that it had produced so many tons of hay or so many bushels of wheat, that is a representation of a fact within the rule.⁴ If he states that it will produce such an amount, that is a

¹ [The fact must be an *existing* fact. *Dawe v. Morris*, 149 Mass. 188; *Love v. Teter*, 24 W. Va. 741; *Adams v. Schiffer*, 11 Colo. 15.]

² [*Cobb v. Wright*, 43 Minn. 83; *Akin v. Kellogg*, 119 N. Y. 441; *Nounnan v. Sutter Co.* 81 Cal. 1; *Norfolk Co. v. Arnold*, 49 N. J. Eq. 390.]

³ [*Gordon v. Butler*, 105 U. S. 553; *Neidefer v. Chastain*, 71 Ind. 363; *Chrysler v. Canaday*, 90 N. Y. 272; *Holbrook v. Connor*, 60 Me. 578; *Dillman v. Nadlehofer*, 119 Ill. 567. For cases where the misrepresentation as to the value of the article sold amounted to fraud, see *Perkins v. Partridge*, 30 N. J. Eq. 82; *Jordan v. Volkenning*, 72 N. Y. 300.]

⁴ [*Rohrschneider v. Knickerbocker Life Insurance Co.* 76 N. Y. 216. Where a false statement as to the amount of its cash capital had been made by a firm to a mercantile agency, one who sold goods to the firm, and to whom the false statement had been imparted, recovered against the firm on the ground of fraud. *Eaton v. Avery*, 83 N. Y. 31. The statement of a fictitious price, alleged to have been paid to the previous owner a short time before, is deceit: *Fairchild v. McMahon*, 139 N. Y. 290.]

mere expression of opinion upon which the vendee has no right to rely. He is bound to exercise his own judgment as to that. So, if the vendor of a horse should state that he had trotted in 2.20, it would be a material statement of fact; but if he said that the horse could do it, it would be matter of opinion, upon which the vendee would have no right to rely.¹

It may be taken as an almost infallible guide or landmark on this subject that any statement relating to the past is a statement of a fact within the rule; whereas any statement as to the future is merely speculative or matter of opinion, and does not bind the vendor.

497. But a misstatement as to an existing intention is the misstatement of a fact, and constitutes fraud. If a person honestly declares that he has a present intention, he is not legally responsible if he changes that intention, unless he has covenanted not to change it. And therefore it has frequently been held that the mere expression of an intention does not amount to such a representation or warranty concerning the future as gives a right of action against the vendor if he fails to carry out his expressed intention.² But if one, in order to influence another, asserts that he has a present intention when in fact he has no such intention, that is a false statement of fact.

In *Edgington v. Fitzmaurice*³ the directors of a stock company issued a prospectus, inviting subscriptions, and stating that their intention was to apply the funds in improving the property of the company and in developing its trade. In fact the funds were wanted to pay off pressing debts. It was held that this misstatement of the intention of the defendants in doing a particular act was the misstatement of a fact, for which they were liable. Lord Justice Bowen said: "There must be a misstatement of an existing fact, but the state of a man's mind is as much a fact as the

¹ [*Southern Development Co. v. Silva*, 125 U. S. 247; *Conant v. National State Bank*, 121 Ind. 323; *Consolidated Rapid Transit Co. v. O'Neil*, 25 Ill. App. 313.]

² [*Gray v. Suspension Car Co.* 127 Ill. 187; *Jorden v. Money*, 5 H. of L. Cas. 185, and cases cited *supra*.]

³ L. R. 29 Ch. D. 459, 483.

state of his digestion. . . . A misrepresentation as to the state of a man's mind is therefore a misstatement of fact."¹

498. Having thus disposed of the past and of the future, let us inquire what is the rule as to representations in regard to the present condition of the property. Whenever the property is equally open to the inspection of both parties, no misrepresentation as to a fact apparent upon inspection avoids the contract.²

But if the vendee has been induced by any artifice whatever not to inspect the property, then such misrepresentation will avoid the contract, although its falsity would have been apparent upon inspection.³

499. All affirmations by the vendor or contractor as to the condition and quality of the article, as of his own knowledge, are statements of fact binding upon him.⁴

500. A statement, although true so far as it goes, is false and fraudulent if it omits by design other matters which would essentially qualify those stated.⁴

In *Peek v. Gurney*⁵ Lord Cairns gave this definition:

¹ In *Milliken v. Thorndike*, 103 Mass. 382, will be found a good illustration of what is a representation of fact; and in *Pedrick v. Porter*, 5 Allen, 324, an example of mere speculative opinion, — an opinion, in this case, as to the profits which could be made from the property in question.

² [*Lowndes v. Lane*, 2 Cox, 363; *Herron v. Herron*, 71 Iowa, 428. The tendency of the modern cases seems to be as follows: The fact that the matter concerning which the misrepresentation is made was open to the inspection of both parties, is evidence to show that the plaintiff did not actually rely upon the misrepresentation, but it is not of itself sufficient to defeat his action. *Cottrill v. Krm*, 100 Mo. 397; *Ledbetter v. Davis*, 121 Ind. 119; *Albany Savings Bank v. Berdick*, 87 N. Y. 40;

Smith v. Smith, 134 N. Y. 62. As was said by Sir George Jessel: "If a man is induced to enter into a contract by a false representation, it is not a sufficient answer to him to say, 'If you had used due diligence you would have found out that the statement was untrue.'" *Redgrave v. Hurd*, L. R. 20 Ch. D. 1, 13.]

³ *Parker v. Moulton*, 114 Mass. 99; [*Mead v. Bunn*, 32 N. Y. 275.]

⁴ *Nickley v. Thomas*, 22 Barb. 652. Thus, a merchant, having been asked by the defendant, to whom he was applying for credit, "How do you stand?" replied that he had "\$3,000 in his business and \$300 in cash," which was true. But he omitted to state that he owed \$2,100. It was held that an action for deceit would lie. *Newell v. Randall*, 32 Minn. 171.]

⁵ L. R. 6 H. L. 377, 403.

"Such a partial and fragmentary statement of fact as that the withholding of that which is not stated makes that which is stated absolutely false."

Lord Justice James cited this case,¹ and added: "Supposing you state a thing partially, you may make as false a statement, as much as if you misstated it altogether. Every word may be true, but if you leave out something which qualifies it you may make a false statement."

501. In the next place, the fact thus misrepresented must be material.² The representation must be of something which constitutes an inducement or motive to the other party to enter into the contract, and by which he is actually misled to his injury. It need not be by any means the controlling motive or the main inducement. If it was one of the facts upon which his judgment was based, either in entering into the contract or in agreeing to pay a certain price, it is then material.³

502. Whether the party thus misrepresenting a material fact knew it to be false or not is wholly immaterial. Whoever affirms as of his knowledge that to be true which is not true, is as responsible in law as if he knew the affirmation to be positively false. And the reason of this is that such false affirmation, although innocently made, operates as an imposition upon the other party, and works just as much injury as if it had been made fraudulently. Whenever a person thus affirms that to be true which he does not know to be true, the law implies, for the protection of the other party,

¹ *Arkwright v. Newbold*, L. R. 17 Ch. D. 301, 318.

² [*Fellowes v. Lord Gwydyr*, 1 Russ. & M. 83. A statement as to what persons have agreed to become directors of a life insurance company, in which the plaintiff is persuaded to take out a policy, is material, and the question of its materiality is a matter for the court: *Penn Mutual Insurance Co. v. Crane*, 134 Mass. 56. See, also, *Karberg's Case* [1892], 3 Ch. 1. But even wilful misrepresentations,

upon the strength of which the defendant contracts with the plaintiff, furnish no cause of action, unless the plaintiff has sustained some damage thereby: *Marsh v. Cook*, 32 N. J. Eq. 262; *Marriner v. Denison*, 78 Cal. 202; *Branham v. Record*, 42 Ind. 181.]

³ [*Morgan v. Skiddy*, 62 N. Y. 319; *Safford v. Grout*, 120 Mass. 20; *Linhart v. Foreman*, 77 Va. 540; *Bradshaw v. Agricultural Ins. Co* 137 N. Y. 137.]

that the statement was made *malo animo*.¹ As was said by Lord Thurlow in *Neville v. Wilkinson*,² "it misleads the parties contracting on the subject of the contract."

The whole doctrine turns upon this, that he who misleads the confidence of another by false statements as to the substance of a purchase, and not his victim, shall be the sufferer. And this is true "whether the misrepresentation be wilfully and designedly false, or ignorantly or negligently untrue."³

"The falsity and fraud consist in representing that he knows the facts to be true of his own knowledge when he has not such knowledge." And this although the defendant was himself misinformed as to the facts.⁴

503. In several English cases it is said that the representation, to have this effect, must be made recklessly, *i. e.* not caring whether it be false or true. This may be a correct statement as regards a mere representation of belief or opinion, but it is not so as regards the positive assertion of a fact. When there is merely a representation of belief or opinion, then the element of actual fraud or deceit must exist, or, what the English courts hold to be its equivalent, "reckless" statements.⁵ But where there is positive affirmation, the fraudulent intent need not exist.⁶

The doctrine upon this subject is elaborately stated in *Smith v. Richards*,⁷ and is thus happily condensed by Mr. Justice Curtis in his marginal note to the case:—

"To set aside a contract on the ground of misrepresenta-

¹ [Chatham Furnace Co. v. Mofatt, 147 Mass. 403; Benton v. Ward, 47 Fed. Rep. 253; Morehead v. Eades, 3 Bush (Ky.), 121; Rowell v. Chase, 61 N. H. 135; Hubbard v. Weare, 79 Iowa, 678; Kirkpatrick v. Reeves, 121 Ind. 280. Some courts hold that any unqualified assertion is a statement as of "one's personal knowledge." Bullitt v. Farrar, 42 Minn. 8. See, also, Totten v. Burdians, 91 Mich. 495.]

² 1 Brown's Chan. Rep. 543, 546.

³ Story, J., in *Doggett v. Emerson*, 3 Story, 700, 734.

⁴ *Litchfield v. Hutchinson*, 117 Mass. 195; *Fisher v. Mellen*, 103 Mass. 503, 506.

⁵ *Edgington v. Fitzmaurice*, L. R. 29 Ch. D. 459, 479, 481, 482.

⁶ [See *Angus v. Clifford* [1891], 2 Ch. 449. Mere carelessness as to whether the statement be true or not will not support an action for deceit.]

⁷ 13 Peters, 26.

tion, it must be of something material, constituting some motive to the contract, — something in regard to which reliance is placed by one party in the other, and by which he is actually misled, — not a matter of opinion merely, equally open to the inquiry and examination of both parties. A false affirmation of a material fact, though innocently made, is ground for a rescission, if the other party was misled by it.”

504. It is essential that the other party relied upon the false statement and was misled by it.¹ If he knew at the time that the representation was untrue, he was not deceived, and in that case he cannot avail himself of the fact that there was a misrepresentation.²

*Nelson v. Stocker*³ is an interesting case upon this point. A youth of seventeen years, previous to his marriage with a widow of thirty-five possessed of personal property, executed a marriage settlement by which he covenanted to pay £1,000 to a trustee for the benefit of his wife. He represented, upon inquiry by her solicitor, that he was of age, but she knew that he was not. After her death he refused to pay the £1,000, and sought to avoid the settlement. The court held that, as the wife was not misled by the misrepresentation, the settlement was not binding upon the husband when he came of age.⁴

Where a prospectus was capable of two constructions, one true and the other false, the plaintiff was held bound to show that he understood it in the false sense, and so was misled. As he stated merely that he understood the words in their “obvious” meaning, there was held to be no proof that he had been misled by them.⁵

505. A misrepresentation concerning the law is not such a misrepresentation as will avoid a contract or other transac-

¹ [Attwood v. Small, 6 Cl. & F. 232, 447; Percival v. Harger, 40 Iowa, 286; Jennings v. Broughton, 5 De Gex, M. & G. 126, 17 Beav. 234.] Even false representations will not give a cause of action if the plaintiff did not rely upon them: Colton v. Stanford, 82 Cal. 351.]

² 4 De G. & Jones, 458.

³ [Farrar v. Churchill, 135 U. S. 609; Van Trott v. Wiese, 36 Wis. 469.]

⁴ [Parker v. Hayes, 39 N. J. Eq. 469.]

⁵ Smith v. Chadwick, L. R. 9 App. Cas. 187.

tion, either at law or in equity. No misrepresentation as to the legal effect of an instrument can avail to avoid the instrument.¹ This doctrine is settled, and it is well stated in *Upton v. Tribilcock*,² where the cases touching it are reviewed. The ground upon which this rule proceeds is that any statement in reference to the law, whether it concerns the legal effect of an instrument or of a transaction, is a mere matter of opinion. It is therefore a matter equally open to all, upon which one can, or is supposed to be able to, judge as well as another; and therefore each one must judge for himself, and has no right to rely upon any representation of the other party.³

In *Upton v. Tribilcock*, *supra*, the allegation was that a stockholder was induced to subscribe to the capital stock of a corporation by the statement that his stock would be assessable only to a certain amount less than its par value, and upon this ground he attempted to avoid his liability for the full assessment. But the court held that presumably he had the charter and by-laws of the company before him and the general law of the State; that it was his duty to read them; and that the extent of his legal liability was a matter of opinion, which he was bound to form for himself upon his own responsibility.⁴ Similar decisions have been made in England.⁵

506. To sum up, the necessary constituents of a misrepresentation, such as will be relieved against in equity, are: (a) The positive affirmation of a fact, as distinguished from the

¹ [*Jaggar v. Winslow*, 30 Minn. 26; *Thompson v. Phoenix Ins. Co.* 75 Me. 55. As where the rights conferred by a liquor license (*Gormley v. Gymnastic Asso.* 55 Wis. 350) or by letters patent (*Dillman v. Nadlehofer*, 119 Ill. 567) are misstated. But a misrepresentation as to the law of a foreign country is held to be a matter of fact, and therefore it will avoid a contract: *Bethell v. Bethell*, 92 Ind. 318, and cases *supra*, page 263.]

² 91 U. S. 45.

³ [But a misstatement of the law made to the plaintiff by one holding a fiduciary relation toward him is ground for avoiding a contract thus induced; *Tompkins v. Hollister*, 60 Mich. 470; *Sands v. Sands*, 112 Ill. 225.]

⁴ See, also, *Hazard v. Griswold*, 21 Fed. Rep. 178; [*Griswold v. Hazard*, 141 U. S. 260.]

⁵ *Rashdall v. Ford*, L. R. 2 Eq. Cas. 750; *Blackburn's Case*, 8 De G., M. & G. 177.

expression of an opinion. (b) This fact must be material to the contract; *i. e.* it must be a fact which of itself, in the opinion of the other party, renders the contract more or less desirable. (c) The party must actually have relied upon the statement and have been misled by it. (A lie not believed is innoxious.) (d) The motive of the person making the misrepresentation is immaterial. If he affirms as a fact what he knows to be untrue, there is intentional falsehood. If he innocently affirms as a fact what he believes to be true, but which is not true, the injury to the other party is just as great as if the statement had been wilfully false, and therefore to allow him to disavow it would operate as an injury upon the other party who was misled by it.

Concealment.

507. Concealment as well as misrepresentation may constitute fraud.¹ But there is a marked distinction between the two cases. In all transactions between man and man, whoever speaks is bound to tell the truth.² But, as a general rule, no one is bound to speak.³ A man may keep silence, and the other contracting party may draw his own inference from this silence.

A familiar illustration is the case of one who purchases land because he has ascertained that there is a valuable mine

¹ [Emigrant Company v. County of Wright, 97 U. S. 339; Stewart v. Wyoming Rancho Co. 128 U. S. 383. It is a fraud when the vendor of land conceals the fact that he is married (Schiffer v. Dietz, 83 N. Y. 300), or that a mortgage was put upon the premises between the time of the contract to convey and the conveyance (Horton v. Hanvil, 41 N. J. Eq. 57), or where the vendor of a check fails to inform the vendee that another check by the same maker has been protested: Brown v. Montgomery, 20 N. Y. 287.]

² [A lost his flock of sheep. B, who had seen them and knew where

they were, asked A if he had found them. A said, "No." "Well," said B, "I suppose that you never will find them;" and thereupon he offered the sum of ten dollars for the flock, which was accepted. It was held that B's remarks amounted to a fraudulent misrepresentation: Bench v. Sheldon, 14 Barb. 66.]

³ [But an applicant for an insurance policy is bound to disclose any material fact within his knowledge, whether he be asked about it or not: Sun Ins. Co. v. Ocean Ins. Co. 107 U. S. 485. See, also, Atlas Bank v. Brownell, 9 R. I. 168.]

upon it, of which the owner is ignorant. There is no legal duty in the purchaser to disclose his information to the owner, and so long as he neither says nor does anything to mislead the owner, a sale cannot be avoided on the ground of his concealment. Concealment is no ground for setting aside a transaction where no duty to disclose exists.¹

508. FIDUCIARY RELATION. — There is one important exception to the general rule as I have stated it. Parties ordinarily deal with each other at arms' length, without any duty towards each other, except (as we have seen) to refrain from misrepresentation by word or deed. But wherever the parties stand in a fiduciary relation to each other — a relation of trust and confidence — another duty arises and a very different rule applies. That rule is as follows: Where one who holds a fiduciary relation to another, as that of trustee or guardian or agent, undertakes to contract with him, he is bound to act with the utmost good faith, and to give the other the benefit of all information which he possesses affecting the transaction.²

¹ [*Pennybacker v. Laidley*, 33 W. Va. 624. It has been held as follows: A debtor, in making a compromise with a creditor, is under no legal obligation to disclose his financial condition: *Graham v. Meyer*, 99 N. Y. 611. The indorser of a note is not legally bound to disclose to one who discounts it the fact that the maker was a minor: *People's Bank's Appeal*, 93 Pa. St. 107. One who conveys his interest in land is not bound to volunteer a statement of what that interest is: *Hastings v. O'Donnell*, 40 Cal. 148. See, also, *Goninan v. Stephenson*, 24 Wis. 75. It has even been held that one purchasing on credit is not bound to disclose his financial condition, unless asked about it, although he knows that he is insolvent: *Bell v. Ellis*, 33 Cal. 620; *Hotchkiss v. Third Nat. Bank*, 127 N. Y. 329. But it is otherwise

where it can be shown that, at the time of the purchase, the purchaser intended not to pay. Thus the United States Supreme Court say: "The doctrine is now established by a preponderance of authority that a party not intending to pay, who as in this instance induces the owner to sell him goods on credit by fraudulently concealing his insolvency and his intent not to pay for them, is guilty of a fraud which entitles the vendor, if no innocent third party has acquired an interest in them, to disaffirm the contract and recover the goods." *Donaldson v. Farwell*, 93 U. S. 631. See, also, *Brower v. Goodyer*, 88 Ind. 572; *Houghtaling v. Hills*, 59 Iowa, 287.]

² [*Tate v. Williamson*, L. R. 2 Ch. App. 55; *Young v. Hughes*, 32 N. J. Eq. 372; *Hegenmyer v. Marks*, 37 Minn. 6.]

We shall presently see that a person in this relation cannot make any contract in regard to the trust property which will be binding upon the other party. But the rule which we are now considering applies to transactions not affecting the trust property; and the duty of full disclosure in regard to such transactions arises from the confidential relations of the parties. This is true of trustee and *cestui que trust* (where the relation is more than nominal), of guardian and ward, of attorney and client, of parent and child. A solicitor buying from his client must communicate to him all information regarding the property which he derived in his capacity as solicitor.¹

509. INVITED CONFIDENCE. — This rule also applies where no fiduciary relation exists, but where one party has induced the other to repose full confidence in him. If one invites the other to trust him, a fiduciary relation² is thus created for the occasion, and the duty of full disclosure attaches to it. For instance, if the vendor says, "I will tell you all I know about the property," and then conceals material facts, his concealment is fraudulent, and equity will relieve against it.

510. UNDUE INFLUENCE. — Another species of fraud, against which equity relieves, is where a voluntary settlement or gift or other pecuniary advantage has been obtained through the exercise of undue influence by one who stands in some confidential relation toward another.³

¹ Luddy's Trustee v. Peard, L. R. 33 Ch. D. 500.

² [This temporary fiduciary relation may be implied from the circumstances of the case: Keen v. James, 39 N. J. Eq. 527.]

³ [Yosti v. Laughran, 49 Mo. 594; Williams v. Williams, 63 Md. 371; Haydock v. Haydock, 34 N. J. Eq. 570; Hemphill v. Holford, 88 Mich. 293; Whelan v. Whelan, 3 Cowen, 537; Leighton v. Orr, 44 Ohio, 679. The conveyance will be set aside, although the undue influence was exercised by one other than the

donee, the donee being innocent in the matter: Graham v. Burch, 44 Minn. 33; Ranken v. Patton, 65 Mo. 378. And the burden of proof is upon the trustee, guardian, physician, etc., to show that the transaction is not fraudulent: Cowee v. Cornell, 75 N. Y. 91; Ashton v. Thompson, 32 Minn. 25. As to what influence is not undue, see Hollocher v. Hollocher, 62 Mo. 267; Burt v. Quisenberry, 132 Ill. 385; Earle v. Norfolk, &c. Co. 36 N. J. Eq. 188; Uhlich v. Muhlke, 61 Ill. 499.]

It has been said by high authority that the ground upon which the law interposes in cases of this description is that of public policy, — that it is contrary to good morals and the best interests of society that one who possesses strong influence over another, by reason of the confidential relations existing between them, should be permitted to abuse that confidence and prostitute that influence to the obtaining of some undue pecuniary advantage.

The leading case upon this subject is *Huguenin v. Baseley*.¹ In that case a clergyman had procured from a lady whose spiritual adviser he had been, and for whom he acted as agent to some extent, a voluntary settlement upon himself of valuable property. The transaction was set aside by Lord Eldon on the ground of undue influence.²

In *Dent v. Bennett*³ Lord Cottenham adopted as the true rule the statement of law made by Sir Samuel Romilly in *Huguenin v. Baseley*, namely: "The relief stands upon a general principle applying to all the variety of relations in which dominion may be exercised by one person over another."

In this last case a physician had obtained a valuable agreement from his patient.

511. Many relations import of themselves some degree of influence, such as those already mentioned of guardian and ward, trustee and *cestui que trust*, attorney and client, parent and child, but the rule is by no means arbitrarily limited to cases of this description. Under whatever circumstances the confidence has been created or the influence acquired, if it be employed fraudulently to coerce or cajole from its subject any undue advantage, equity will interpose. Lord Cottenham said in *Dent v. Bennett*, *supra*: "I will not narrow the rule or run the risk of in any degree fettering the exercise of the beneficial jurisdiction of this court by any enumeration of the description of persons against whom it ought to be most freely exercised."⁴

¹ 14 Ves. 273; White & Tudor's German Church, 12 Mo. App. Leading Cases in Equity, vol. ii. 293.]

part 2, p. 556.

³ 4 Myl. & Cr. 269, 277.

² [See, also, *Caspari v. First*

⁴ An excellent illustration of un-

As in every case the question is almost entirely one of fact, an examination of particular cases would be useless. They are collected in the notes to *Huguenin v. Baseley*, *supra*.

512. Whenever property has been obtained by means of the fraud which we have considered, — whether that fraud consists in misrepresentation, concealment, or undue influence, — and the property remains in the hands of the wrongdoer, or one taking it with notice, equity at once fastens a trust upon the property and converts the wrongful holder into a trustee for the injured party.¹ If it has been transferred to a *bond fide* purchaser, the only relief will be in damages.

Inadequacy of Consideration.

513. It has been a matter of some discussion how far inadequacy of consideration is sufficient evidence of fraud to induce a court of equity to set aside the transaction. I think it must be assumed that mere disproportion between the value of the thing and the price paid constitutes of itself no sufficient evidence of fraud.² But the courts are disposed to hold that this disproportion may reach such an extreme point that it can be accounted for only on the ground of fraud or undue influence.

514. Mere discrepancies in the judgments of ordinarily

due influence will be found in the case of *Allcard v. Skinner*, L. R. 36 Ch. D. 145.

¹ See *supra*, p. 158.

² [*Harrison v. Guest*, 6 De Gex, M. & G. 424, 8 H. of L. Cas. 481; *Coleman v. Bank*, 2 Strob. Eq. 285; *Birke v. Abbott*, 103 Ind. 1; *Howard v. Edgell*, 17 Vt. 9; *Wood v. Craft*, 85 Ala. 260; *Austin v. Hatch*, 159 Mass. 198; *Phillips v. Pullen*, 45 N. J. Eq. 5, 830; *Defendarfer v. Dicks*, 105 N. Y. 445; *Bethlehem Iron Co. v. Phila. R. R. Co.* 49 N. J. Eq. 356. So, where plaintiff's title was doubtful, and only to be enforced by prolonged liti-

gation, it was held that the price of five hundred dollars for land worth two hundred and thirty thousand dollars was not sufficient evidence of fraud: *Pennybacker v. Laidley*, 33 W. Va. 624. The rule applies especially to sales at public auction: *Erwin v. Parham*, 12 How. 197. So a court of equity will often refuse to set aside a contract on the ground of inadequacy of consideration, and yet refuse also to enforce the same contract for the opposite party, thus leaving both parties to the courts of law: *Osgood v. Franklin*, 2 Johns. Ch. 1; *Graham v. Pancoast*, 30 Pa. St. 89.]

intelligent men as to value are of small account in this matter. But where there was no intent to make a gift, and by common consent the price paid would be considered ridiculously small for the property, a court of equity will treat this of itself as sufficient evidence of fraud. The language of some cases is, "If the inadequacy of price is so gross as to shock the conscience," it is fraud.¹ Inadequacy of price coupled with any other unfairness will be sufficient.²

Thus it was said by the United States Supreme Court: "If, in addition to gross inadequacy, the purchaser has been guilty of any unfairness or has taken any undue advantage, or if the owner of the property or party interested in it has been for any other reason misled or surprised, then the sale will be regarded as fraudulent and void. . . . Great inadequacy requires only slight circumstances of unfairness, in the conduct of the party benefited by the sale, to raise the presumption of fraud."³

And in *Fry v. Lane*⁴ the court said: "Where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a court of equity will set aside the transaction;" *à fortiori* where the interest sold is reversionary.

515. The condition of the person from whom the bargain has been obtained is always an important element in the consideration of a court of equity. If, from natural infirmity, or from age, sickness, or gross ignorance, or from any

¹ [Berry v. Lovi, 107 Ill. 612; Hodgson v. Farrell, 15 N. J. Eq. 88; Mitchell v. Jones, 50 Mo. 438.]

² [Witherwax v. Riddle, 121 Ill. 140; Kennedy v. Currie, 3 Wash. 442; Burke v. Taylor, 94 Ala. 530; Kelly v. Smith, 73 Wis. 191. So where, at a sheriff's sale on execution, two lots were sold together which, in justice to the debtor, ought to have been sold separately: Lurton v. Rogers, 139 Ill. 554. In another Illinois case, judgment had been recovered for one cent and costs, amounting to seventeen dol-

lars and twenty-four cents. Without making any demand upon the debtor, the sheriff levied execution upon real estate belonging to him, amounting in value to two hundred and thirty thousand dollars. This property was sold in one lot, and knocked down to the judgment creditor for the sum of seventeen dollars and twenty-five cents. The court set aside the sale: Davis v. Chicago Dock Co. 129 Ill. 180.]

³ Graffam v. Burgess, 117 U. S. 180, 192.

⁴ L. R. 40 Ch. D. 312, 322.

other cause, he is weak in mind or will, a court of equity will set aside any unfair transaction into which he has entered.¹ It will do so if he was drunk when the bargain was made.²

¹ *Griffith v. Godey*, 113 U. S. 89; *Allore v. Jewell*, 94 U. S. 506; *Parkhurst v. Hosford*, 10 Sawyer, 401. See, also, *Conley v. Nailor*, 118 U. S. 127; [*King v. Davis*, 60 Vt. 502; *Mott v. Mott*, 49 N. J. Eq. 192; *Bunch v. Hurst*, 3 Desau. 273. That the plaintiff was a spendthrift is held to be important: *Brown v. Hall*, 14 R. I. 249;

Buford v. Louisville Co. 82 Ky. 286. And so of the fact that the vendor could neither read nor write: *Morriso v. Philliber*, 30 Mo. 145.]

² *Thackrah v. Haas*, 119 U. S. 499. [As to how drunk he must be in order to obtain this immunity, see *Watson v. Doyle*, 130 Ill. 415; *Wright v. Fisher*, 65 Mich. 275.]

CHAPTER XIX.

CONSTRUCTIVE FRAUD.

516. JUDGE STORY has given this definition: "By constructive frauds are meant such acts or contracts as, although not originating in any actual evil design or contrivance to perpetuate [*sic*] a positive fraud or injury upon other persons, are yet, by their tendency to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure the public interests, deemed equally reprehensible with positive fraud, and therefore are prohibited by law as within the same reason and mischief as acts and contracts done *malo animo*." ¹

517. Although, as a matter of fact, the element of bad faith often exists in the cases ranged under the head of constructive fraud, it must not be forgotten that the existence of bad faith or of a corrupt motive is not a necessary condition for equitable relief in these cases. It is enough — and this is the foundation of the whole doctrine of constructive fraud — that to certain acts done under certain circumstances, or by parties standing in certain relations, the law imputes fraud, because the inevitable tendency of such conduct is to cause injury and injustice, and it is against public policy and good morals.

518. For our present purpose, cases of constructive fraud may be arranged in two classes: 1st. Cases where the contract or transaction itself is against public policy, or may operate as a fraud upon or injury to third persons; 2d. Cases where the relation of the parties is such that one cannot be allowed to obtain any pecuniary advantage over the other without violating the fundamental principles of justice and good morals.

In the first case the imputed fraud grows out of the very

¹ 1 Story's Eq. § 258.

subject-matter of the contract; in the second, out of the relation to each other of the contracting parties.

519. To the first class belong all marriage brokerage contracts, *i. e.* contracts by which one person engages to pay another a consideration for effecting a marriage for him. These are condemned on grounds of public policy.¹ Chief Justice Parsons well said in *Boynton v. Hubbard*² that such contracts are void "because they are a fraud on third persons and are a public mischief, as they have a tendency to cause matrimony to be contracted on mistaken principles and without the advice of friends; and they are relieved against as a general mischief, for the sake of the public."

In *Williamson v. Gihon*³ a bond given after marriage, as a remuneration for having assisted the obligor in an elopement and marriage, was condemned and relieved against upon similar grounds.

520. All contracts and conditions in total restraint of marriage are condemned for the same reason. Marriage is encouraged by law as essential to the perpetuity and good of the state, and the marriage contract therefore, above all other contracts, should be the result of full and free consent.⁴

521. It is to be noticed, however, that not all restrictions are unlawful, but those only which amount to an absolute prohibition of marriage in the particular case. Thus, it is well settled that a condition that the donee shall not marry without the consent of certain persons, or before arriving at a certain age, or shall not marry a particular person named, or the native of a particular country, or one belonging to a particular religious body, is a perfectly good condition.⁵

¹ [A contract with a matrimonial bureau to pay money for obtaining a husband is void: *Duval v. Wellman*, 124 N. Y. 156.]

² 7 Mass. 111, 118.

³ 2 Sch. & Lef. 356.

⁴ [It is held that a policy of insurance payable in full in two years if the insured does not marry in the mean time, and payable for a reduced amount if he does marry within that time, is a wager: *Chal-*

fant v. Payton, 91 Ind. 202. And so of an insurance policy payable on marriage, but void if the insured marries within three months: *White v. Equitable Benefit Union*, 76 Ala. 251. Where a bequest to a daughter is made upon condition that she shall continue to live apart from her husband, the condition is void: *Wren v. Bradley*, 2 De Gex & Sm. 49.]

⁵ The cases are collected in

522. It is also well settled that all conditions in absolute restraint of a second marriage by a widow are good; and this not only in the case of a gift by a testator to his own widow, but in the case of a gift to the widow of another person. The same is true of a widower.¹

523. Equity also condemns all contracts or transactions which will operate as a fraud upon either of the parties to the marriage, and will set them aside in favor of the injured party. Thus where a woman, in contemplation of marriage, secretly made a settlement of her property to her own separate use, without her intended husband's knowledge, it was held to operate as a fraud upon his just expectations, and was set aside in his favor.²

This rule, however, is of no force now in Massachusetts, or in other States where by law a woman retains the ownership and control of her property after marriage.³

Upon the same ground, where a father objected to the marriage of his daughter on account of the intended husband being in debt, and the brother of the latter engaged to pay his debts, and then the husband gave a secret bond to the brother to repay him, the transaction was held fraudulent and the bond invalid, because the effect would have been merely to transfer the debts of the husband from one creditor to another.⁴

So, also, where a father settled an annuity upon his son's wife in place of her jointure, and then the son gave the father secretly a bond of indemnity against the annuity, it was held void as a fraud upon the wife, because it left her practically

Smith's Eq. at p. 161; [Graydon v. Graydon, 23 N. J. Eq. 229; Jenner v. Turner, L. R. 16 Ch. D. 188; Phillips v. Ferguson, 85 Va. 509.]

¹ Allen v. Jackson, L. R. 1 Ch. D. 529; [Knight v. Mahoney, 152 Mass. 523; Newton v. Marsden, 2 John. & H. 356.]

² [Tucker v. Andrews, 13 Me. 124; Goddard v. Snow, 1 Russ. 485. In Smith v. Smith, 6 N. J. Eq. 515, the rule was applied in favor of a wife. But a man may make a rea-

sonable settlement on his children by a former wife: Kinne v. Webb, 54 Fed. Rep. 34.]

³ See the cases cited in 1 Story's Eq. § 273. [*Contra*, Duncan's Appeal, 43 Pa. St. 67, on the ground that the husband has a right to expect that his wife will continue to control her property, and will not put it in the hands of another.]

⁴ Redman v. Redman, 1 Vern. 348; 1 Story's Eq. § 269.

no better off than she was, nor so well off, for without the bond she could have claimed her jointure. So, again, where a brother lent his sister a certain sum so that her fortune might appear to be as much as was insisted upon by the husband's family, and the sister gave a bond for its repayment, the bond was set aside as a fraud upon the husband.¹

These illustrations must suffice; they all conspire to this result, namely, that, where either party has been induced to enter into marriage upon an understanding or representation as to the pecuniary condition of the other, no secret contract or transfer altering that pecuniary condition, made by any one who knowingly has contributed to the understanding or representation, will be allowed to stand in equity.

524. The fourth class of bargains which equity condemns as constructively fraudulent is transactions with expectant heirs and reversioners for the sale of their future interests.² These are condemned upon two grounds, first, because as between the heir and the purchaser the transaction is commonly a harsh and unconscientious one, the purchaser practising upon the necessities of the heir; but secondly and chiefly because such a sale is a fraud upon the ancestors or other persons from whom the interest is derived or expected.

In *Chesterfield v. Janssen*³ Lord Hardwicke, in his famous enumeration of the different species of fraud which would induce the interference of a court of equity, named as his fifth class cases of "catching bargains with heirs, reversioners, or expectants in the life of the father, etc." And, from his day on, all such bargains have been set aside, unless made for a full consideration and under circumstances which repelled every suspicion of overreaching. Where the sale is of a mere expectancy, that is, where the estate is not entailed, and the expectation depends upon the bounty of the

¹ *Palmer v. Neave*, 11 Ves. 165; *Gale v. Lindo*, 1 Vern. 475; 1 Story's Eq. § 270.

² [*Earl of Aylesford v. Morris*, L. R. 8 Ch. App. 484. But a sale of a reversion or a remainder is said to be valid in this country, because the rules of primogeniture and of

entail do not apply here: *Cribbins v. Markwood*, 13 Gratt. 495. Nor does the rule stated in the text apply to the sale of a legacy payable at a certain time after the testator's death: *Parmelee v. Cameron*, 41 N. Y. 392.]

³ 2 Ves. Sr. 125, 157.

ancestor, or upon his not interfering with the law of descent, the transaction operates as a fraud upon third persons; and the disposition has been to hold such bargains absolutely void for that reason, both at law and in equity.

It was so decided in *Boynton v. Hubbard*,¹ where Chief Justice Parsons set forth the reason of the doctrine in this emphatic language: "The ancestor, having no knowledge of the existence of the contract, is induced to submit his estate to the disposition of the law, which had designated the defendant as an heir. The defendant's agreement with the plaintiff [the purchaser] is to substitute him as a co-heir with himself to his uncle's estate. The uncle is thus made to leave a portion of his estate to a stranger without his knowledge, and consequently without any such intention. This, Lord Hardwicke calls a deceit on the ancestor. And what is the consequence of deceits of this kind upon the public? Heirs who ought to be under the reasonable advice and direction of their ancestor, who has no other influence over them than what arises from a fear of his displeasure, from which fear the heirs may be induced to live industriously, virtuously, and prudently, are, with the aid of money speculators, let loose from this salutary control, and may indulge in prodigality, idleness, and vice, and taking care, by hypocritically preserving appearances, not to alarm their ancestor, may go on, trafficking with his expected bounty, making it a fund to supply the wastes of dissipation and extravagance. Certainly the policy of the law will not sanction a transaction of this kind, from a regard to the moral habits of the citizens." And that, so far as I know, is the law of this country at the present time.

525. In England, in 1867, the act 31 & 32 Vic. ch. 4 was passed, to the effect "that no purchase made *bonâ fide*, and without fraud or unfair dealing, of any reversionary interest in real or personal estate, shall hereafter be opened or set aside merely on the ground of undervalue."

But in *Tyler v. Yates*² Lord Chancellor Hatherly held that this act did not remove such transactions from the investigation of a court of equity, nor deprive that court of

¹ 7 Mass. 112.

² L. R. 6 Ch. App. Cas. 665.

its right to relieve the unwary or the necessitous from extortionate and oppressive bargains.¹

526. CONVEYANCES IN FRAUD OF CREDITORS. — Another and perhaps the most important class of transactions over which equity exercises control, on account of their injurious effect upon third persons, is that of gifts and conveyances made to hinder or defraud creditors.

The statute 13 Elizabeth, ch. 5, provided that all gifts and transfers made by a debtor with the intent to delay, hinder, or defraud his creditors should be void as against them.

Such gifts and transfers are good as between the parties.

It has frequently been said by high authority that this statute really introduced no new rule, but was simply declaratory of the common law. However this may be, it is certain (as has often been decided) that the statute forms a part of the inherited common law of this country, except where it may have been modified by statute. It is in full force and operation in Massachusetts.²

It is a matter of such frequent application, and of so much practical importance, that it is worth our while to notice the main points arising under the statute. At the present day, quite as much as when it was enacted, this statute constitutes the law upon the subject; and in order to determine whether any transaction is fraudulent as against creditors, we must seek our answer in the provisions of the statute and the decisions which have been made under it.

527. The statute covers transfers of choses in action, as well as goods, chattels, lands, and tenements. The statute

¹ To the same effect is *Fry v. Lane*, L. R. 40 Ch. D. 312, where many cases are cited by the court. [So agreements in restraint of trade, or to suppress competition, either by a "trust" or by a trades union, or by a "corner" in the market, and agreements not to bid at auction, or not to compete for a government contract, and agreements to influence public officers unduly (*Brooks v. Cooper*, 50 N. J.

Eq. 761), and contracts for immoral purposes, are void: 2 *Pomeroy's Eq.* 934. And so of an agreement to pay money to a person for procuring a will to be made in favor of the promisor: *Debenham v. Ox*, 1 Ves. Sr. 276. As to when equity will grant relief in these cases, see *supra*, p. 78, note.]

² See, also, Pub. Stats. ch. 172, § 1; [*Howe v. Ward*, 4 Me. 195.]

itself enumerates only "goods, chattels, lands, and tenements;" and a question was made whether "choses in action," or other rights of property not accurately definable as either goods, chattels, lands, or tenements, were within the scope of the statute. But it has long been settled that the statute covers choses in action, and all other rights of property which a debtor may assign, as well as those specifically enumerated in it.¹

528. WHAT TRANSFERS ARE CONTRARY TO THE STATUTE AND VOID. — All transfers made by a debtor with actual intent to defraud his creditors, although made for an adequate consideration, are void as against the creditors if the grantee participated in and assisted the debtor in the unlawful intent and purpose. Where a grantee has paid a full consideration for the property, it is of course necessary to bring home very clearly to him a knowledge of the debtor's fraudulent purpose and a coöperation with him in it; but if this is done, the fact that he has paid a full price for the property will be no defence.²

529. For example: A debtor owns real estate. He wishes to convert it into money, so that he may abscond, or otherwise secrete the proceeds from his creditors. Whoever buys in order to enable the debtor to carry out this scheme, although he pays a full price for the property, assists the debtor to commit a fraud upon his creditors, and equity will declare the conveyance to be void as against them both. So, also, if a person lends money to a debtor and takes a mortgage upon his property for the actual amount loaned, still, if the loan was made with the intent and purpose to enable the

¹ See *Drake v. Rice*, 130 Mass. 410, where the English cases are cited; [*Orendorf v. Budlong*, 12 Fed. Rep. 24. An assignment, for a valuable consideration, of wages to be earned in the future will be set aside if made in fraud of creditors: *Gragg v. Martin*, 12 Allen, 498.]

² *Wadsworth v. Williams*, 100 Mass. 126; [*Clements v. Moore*, 6 Wall. 299; *Buck v. Voreis*, 89 Ind.

116; *Ferguson v. Hillman*, 55 Wis. 181; *Herman v. McKinney*, 47 Fed. Rep. 758. The mere fact that the grantee knew the grantor to be insolvent is not sufficient: *Crawford v. Kirksey*, 55 Ala. 282. Failure to record the deed for fear of injuring the grantor's credit is not sufficient evidence of fraudulent intent: *Flemington National Bank v. Jones*, 50 N. J. Eq. 244.]

debtor to withdraw so much of his property from the reach of his creditors, the transaction is illegal, and the mortgage is void as against the creditors.¹

530. These propositions also hold good although the grantor, the debtor, may have been perfectly solvent at the time when the conveyance was made. A solvent debtor may be disposed to cheat his creditors, and he may do this by converting his property into such form that he can secrete it, and thus pretend poverty, or abscond with it. The question is, was the transaction designed and calculated to "delay, hinder, or defraud creditors?" If so, then it is void, no matter how solvent the debtor may have been, nor how much the purchaser may have paid for the property.

As a matter of mere evidence, the fact that a purchaser has paid full price for property, or that the debtor was solvent, certainly tends to show good faith; ² but, as we have seen, it is by no means conclusive.³

531. If a conveyance is made on adequate consideration, it will be valid as against the creditors of the grantor, however fraudulent his own purpose may have been if the grantee had no knowledge of it.⁴

532. **MARRIAGE CONSTITUTES A LEGAL CONSIDERATION.** — In an ante-nuptial agreement by which the intended husband settles property upon the wife, the marriage is a sufficient consideration to uphold the settlement in behalf of the wife as against the husband's creditors.⁵

In *Prewit v. Wilson*⁶ it was attempted to set aside a settlement on the ground that it was made by the husband to defraud his creditors; but as the wife had no knowledge of this fraudulent purpose, and as the marriage was held to

¹ *Stinson v. Hawkins*, 13 Fed. Rep. 833.

² [*Nugent v. Jacobs*, 103 N. Y. 125.]

³ *Wadsworth v. Williams*, 100 Mass. 126, *supra*.

⁴ *Prewit v. Wilson*, 103 U. S. 22; [*Roe v. Moore*, 35 N. J. Eq. 526; *Starin v. Kelly*, 88 N. Y. 418. The rule extends to one who purchases

an equitable interest in the debtor's estate: *Halifax, &c. Co. v. Gledhill* [1891], 1 Ch. 31. As to what is notice to the grantee, see *Parker v. Conner*, 93 N. Y. 118; *De Witt v. Van Sickle*, 29 N. J. Eq. 209, and also *infra*, p. 508.]

⁵ [*Lionberger v. Baker*, 88 Mo. 447.]

⁶ 103 U. S. 22.

be a full and adequate consideration, her rights under the settlement were upheld.

"Marriage," said the court, "in contemplation of the law is not only a valuable consideration to support such a settlement, but is a consideration of the highest value, and from motives of the soundest policy is upheld with a steady resolution." And, long before, Lord Coke had said that there was no other consideration so much respected in the law.

In *Deshon v. Wood*¹ there was an extraordinary decision to the effect that bonds delivered to an intended wife, in consideration of marriage, and to take effect upon the marriage, as a gift or settlement, were liable to be taken by creditors, the husband being insolvent at the time when the gift was made.

533. In the absence of any statute prohibiting it, a conveyance of property by a debtor to a single creditor by way of preference for the payment of his debt is good at common law. At common law a debtor may prefer one or more of his creditors to the exclusion of the rest.

If the property be no more than a sufficient consideration for the debt, and the transfer is not made upon any secret trust for the benefit of the debtor, it is valid at the common law.²

534. VOLUNTARY CONVEYANCES. — Voluntary conveyances are those which are not made for a "valuable consideration," but from motives of affection or favor. They are pure gifts. It is important to ascertain how far conveyances of this nature are contrary to the statute.

Of course all voluntary conveyances or gifts made with the actual intent to hinder or defraud creditors are absolutely void as against them, whether the creditors became such before or after the gift was made.³

¹ 148 Mass. 132.

² *Banfield v. Whipple*, 14 Allen, 13; *Brashear v. West*, 7 Peters, 608, 614; *Reed v. McIntyre*, 98 U. S. 507; *Mayer v. Hellman*, 91 U. S. 496; [*Livermore v. McNair*, 34 N. J. Eq. 478; *Strauss v. Parshall*, 91 Mich. 475; *Mackellar v. Pillsbury*,

48 Minn. 396; *Barr v. Church*, 82 Wis. 382; *First Nat. Bank v. Smith*, 93 Ala. 97. This is changed in Massachusetts and in many other States by the insolvency law. See Mass. Pub. Stats. ch. 157, §§ 96-98.]

³ [*Platt v. Schreyer*, 25 Fed. Rep.

But, eliminating the element of actual fraud or bad faith, the question remains what voluntary conveyances are, and what are not void under the statute. No voluntary conveyance by a debtor is good as against his creditors, however innocent he or his grantee may be, if his circumstances did not justify the gift and leave an ample residue to satisfy all claims of creditors at the time.¹

535. The fact that a man owes debts does not of itself render a voluntary transfer or settlement void, provided he has a residue undoubtedly sufficient to meet his liabilities.² The richest men often owe the largest debts. But there must be no doubt about this. If the debtor so far disables himself that his existing creditors are hindered or delayed, then as against them the conveyance is void.³

But with this qualification, the right of a person to make voluntary gifts or transfers is clear, and such gifts do not become void because, by some unlooked-for disaster or reversal in business, he subsequently becomes insolvent.⁴

536. Questions of this nature have arisen most frequently under voluntary settlements made by a husband in favor of his wife and family. A voluntary settlement, it must be understood, is one made after marriage, and one which the husband was not legally bound to make in pursuance of some ante-nuptial agreement. It is made, not under any legal necessity, but simply for the laudable purpose of making provision for wife or children.

In *Jones v. Clifton*⁵ the rule was thus stated: "The right of a husband to settle a portion of his property upon his wife, and thus provide against the vicissitudes of fortune, when this can be done without impairing existing claims of

83 and note; *Carter v. Grimshaw*, 49 N. H. 100. This of course is true whether the grantee did or did not participate in the fraudulent intent: *Laughton v. Harden*, 68 Me. 208; *Foley v. Bitter*, 34 Md. 646; *Clark v. Chamberlain*, 13 Allen, 257.]

¹ [*Kehr v. Smith*, 20 Wall. 31; *York v. Rockwood*, 132 Ind. 358; *Smith v. Cherrill*, L. R. 4 Eq. 391.]

² *Thacher v. Phinney*, 7 Allen, 146.

³ *Kehr v. Smith*, 20 Wall. 31 (a case where a settlement upon a wife was held void); *Freeman v. Pope*, L. R. 5 Ch. App. 538.

⁴ [*Carr v. Breese*, 81 N. Y. 584; *Second National Bank v. Merrill*, 81 Wis. 142.]

⁵ 101 U. S. 225, 227.

creditors, is indisputable.”¹ Such conveyances are thus held to be good as respects existing creditors when made by a person perfectly solvent at the time.

In *Cook v. Holbrook*² it is said that the question, whether a voluntary settlement made for the benefit of wife or children was fraudulent as against existing creditors, is always a question of fact, under all the circumstances. It “is not as matter of law fraudulent and void as to existing creditors.” *A fortiori*, such transfers are good as against subsequent creditors. “It is a well-settled rule of law that if a person, being solvent at the time, without any actual intent to defraud creditors, disposes of property for an inadequate consideration, or even makes a voluntary conveyance of it, subsequent creditors cannot question the transaction. They are not injured. They gave credit to the debtor in the status which he had after the voluntary conveyance was made.”³

537. It is, however, equally settled that although a person is perfectly solvent, or even absolutely free from debt, yet if, in contemplation of entering upon a hazardous business, he makes a voluntary settlement of his property, so that in case of disaster it shall be removed from the claims of creditors, such voluntary settlement is void under the statute as against subsequent creditors.⁴

To avoid such a settlement it is not necessary that the settlor should have contemplated becoming insolvent; it is sufficient if he enters upon a business or course of conduct hazardous in itself, or likely to result in insolvency. This is no new doctrine. Lord Hardwicke said: ⁵ “It is not necessary that a man should actually be indebted at the time he enters into a voluntary settlement to make it fraudulent; for, if a man does it with a view to his being indebted at a

¹ The same doctrine had been established in the earlier cases of *Sexton v. Wheaton*, 8 Wheat. 229; *Smith v. Vodges*, 92 U. S. 183.

² 146 Mass. 66.

³ *Graham v. Railroad Co.* 102 U. S. 148, 153.

⁴ [*Mullen v. Wilson*, 44 Pa. St.

413; *Neuberger v. Keim*, 134 N. Y. 35; *Fisher v. Lewis*, 69 Mo. 629.]

⁵ *Stileman v. Ashdown*, 2 Atk. 477. See, also, *McKay v. Douglass*, L. R. 14 Eq. C. 106; *Crossley v. Elworthy*, L. R. 12 Eq. C. 158; *In re Pearson*, L. R. 3 Ch. D. 807.

future time, it is equally fraudulent, and ought to be set aside."

538. No one can make a voluntary settlement of his own property for his own benefit which under any circumstances will be good as against creditors.¹

539. But a married man may use a moderate portion of his earnings to insure his life, and thus make reasonable provision for his wife and children after his death, although he may die insolvent. This right is based on the same public policy which permits and even requires him to devote his earnings first to the support of his family.²

540. As to the fraudulent intent, it is never necessary to show, by any evidence in addition to the transaction itself, that an express design existed to defraud creditors. If the probable effect of the transaction will be to hinder or defeat them, the law infers the intent, and the conveyance is within the statute.³

"If actually insolvent, the debtor is held to knowledge of his condition; and if the necessary consequence of his act is to hinder, delay, or defraud his creditors, . . . the presumption of the fraudulent intent is irrebuttable and conclusive, and inquiry into his motives is inadmissible."⁴

541. The remaining question is, In whose favor will the statute be applied; against whom are the gifts and conveyances void? This question has been answered to some extent already.

The statute operates only in behalf of creditors. The fraudulent conveyance is good and unimpeachable as between the parties themselves, and as between the grantee and the heirs, devisees, or subsequent grantees of the debtor.⁵

542. Does the statute operate in favor of subsequent as

¹ *In re Pearson*, *supra*; *Jackson v. Von Zedlitz*, 136 Mass. 342.

² *Washington Central Bank v. Hume*, 128 U. S. 195.

³ *Jenkyn v. Vaughan*, 3 Drew, 419, *Crosley v. Elworthy*, *supra*, 2 Pomeroy's Eq. §§ 970, 971. But see *Cook v. Holbrook*, 146 Mass. 66, *supra*.

⁴ *Washington Central Bank v. Hume*, 128 U. S. 211.

⁵ *Freeland v. Freeland*, 102 Mass. 475; [*Williams v. Williams*, 34 Pa. St. 312; *Robertson v. Sayre*, 134 N. Y. 97; *McCall v. Pixley*, 48 Ohio St. 379.]

well as existing creditors? The rule is as follows: If a conveyance be made with an actual intent to defraud, and this intent is participated in by the grantee, the conveyance may be avoided by subsequent as well as by existing creditors, whether the conveyance was made for a full consideration or was purely voluntary.¹

On the other hand, a voluntary conveyance untainted with fraud is good as against subsequent creditors, and cannot be impeached by them.²

543. A voluntary conveyance untainted with actual fraud is good as against existing creditors when the debtor has a clear sufficiency to pay all existing debts; but in the absence of such clear sufficiency the law presumes that the intent was to delay, hinder, or defraud creditors, because that is the inevitable effect, and therefore the instrument will be annulled as against them.³

The theory of the statute of Elizabeth is that a man must be just before he is generous, and that debts must be paid before gifts can be made.

544. The great value and importance of the remedies in equity enabling creditors to reach property which has fraudulently been transferred by a debtor, as compared with any remedies provided by the common law, are seen in these particulars:—

In the case of real estate fraudulently conveyed, the common law furnishes no remedy whatever by which the interest of the debtor can be reached. Inasmuch as the legal title to the property is in the grantee, the estate cannot be levied upon as the property of the debtor. His interest in the estate, or rather the interest of the creditor in it, is purely an equitable one, the legal title being in the grantee. It is not therefore subject to seizure and levy upon execution

¹ *Day v. Cooley*, 118 Mass. 524, *v. N. W. Association*, 48 Minn. 527; *Parkman v. Welch*, 19 Pick. 490.]

² *Parkman v. Welch*, 19 Pick. 237; *Graham v. Railroad Co.* 102 U. S. 153, *supra*; [*Metropolitan National Bank v. Rogers*, 47 Fed. Rep. 148.]

Contra, if the intent was to defraud existing creditors only: *Fullington*

³ *Freeman v. Pope*, L. R. 5 Ch. App. 538.

at law, and can only be reached in equity. Equity reaches it by establishing the creditor's lien upon it, and by ordering it to be sold to satisfy his execution.

545. It has, indeed, been held in some States that where a debtor has fraudulently conveyed real estate a creditor may levy his execution directly upon it, as if the legal title were still in the debtor.¹ But this is very questionable doctrine.

It is at least doubtful whether such a right would ever have been conceded in Massachusetts, and the statutes to which I shall presently refer imply very strongly that, in the absence of an express statute authorizing such a proceeding, a creditor could not levy his execution upon land which had been conveyed by the debtor, although such conveyance was fraudulent.

546. But another favorite mode of concealing property is for the debtor to furnish the consideration for a purchase of land, and have the conveyance made to a third person upon a secret trust to hold it for the benefit of the debtor. Now, in this case, the legal title never has been in the debtor, and the authorities agree that, in the absence of an express statute, a creditor cannot levy his execution upon land thus held, and that the only way to reach it is by a bill in equity.²

547. Again, the great value of the equitable remedy consists in this, that a court of equity can lay its hands immediately upon the property and prevent the fraudulent grantee from disposing of it. Otherwise the fraudulent grantee, by conveying the property to an innocent purchaser, might at once put it beyond the reach of creditors.³

Statute 27 Elizabeth, ch. 4.

548. The statute 13 Elizabeth, which we have been considering, was passed for the protection of creditors. The statute 27 Elizabeth, ch. 4, was designed for the protection of purchasers. In substance it provides that all conveyances of

¹ See Wait on Fraudulent Conveyances, § 59, and cases cited in the note. Wait on Fraudulent Conveyances, § 57.

² [See, also, *infra*, Creditors' Bills, p. 387.]

³ *Howe v. Bishop*, 3 Met. 26; *Hamilton v. Cone*, 99 Mass. 478;

real estate made to defraud and deceive subsequent purchasers of the same for a valuable consideration shall, as against such purchasers, be "utterly void, frustrate, and of none effect." That is to say, if a grantor has made two conveyances of the same estate to successive grantees, and the second grantee has paid a valuable consideration for it, if it turns out that the first conveyance was made and accepted for the purpose of defrauding the second grantee, it shall be utterly void as to him, and the second deed shall take precedence.

In England, where formerly no system for the registration of deeds existed, and where such a system exists now only to a very limited extent, opportunities for the fraud against which this statute is directed would arise very frequently. A second purchaser might well purchase without any knowledge or means of knowledge that a conveyance of the same property had already been made, and thus be defrauded by a dishonest grantor who had previously conveyed the same estate.

549. In this country, where a registry system prevails, — I presume in every State, — by which every unrecorded deed is made void as against a subsequent purchaser without notice, the opportunities for fraud and for the application of this statute must be very infrequent. Still, as is well settled, the statute 27 Elizabeth constitutes a part of our common law, and it may be invoked for the protection of a purchaser whenever it becomes necessary.¹

One case which may be imagined is where an owner of real estate, intending to defraud an anticipated purchaser, first makes a conveyance to a third person who is a party to the scheme, putting that deed on record, and then conveys to the innocent purchaser, at the same time inducing him not to examine the records by representing that no prior conveyance had been made. Although the recorded deed would ordinarily be notice to the purchaser, yet under such circumstances it would be clear that the prior conveyance had been made for the very purpose of defrauding him, and equity would undoubtedly, by virtue of the statute, declare it to be void as against him.

¹ [Hill v. Ahern, 135 Mass. 158.]

550. Two or three points only remain to be stated under this statute. (a) Unlike the statute 13 Elizabeth, this statute relates exclusively to transfers of real estate. It does not concern personal property.¹

(b) The grantee of the first deed must participate in the fraudulent intent of the grantor in order to render his conveyance void as respects a subsequent purchaser.

(c) The subsequent purchaser must have paid money or an equivalent consideration. The language of the statute is "money or any good consideration," but "good" in this connection is held to mean valuable, in distinction from considerations based solely on affection, relationship, or generosity.²

(d) If the first conveyance was voluntary (*i. e.* upon no valuable consideration, but simply from affection or favor), by the rule established in England it is void as against a subsequent purchaser for value, even although he has notice of this prior conveyance. From the mere fact that the first conveyance was voluntary, it is conclusively presumed to have been made with the intent to deceive and defraud a subsequent purchaser. Thus, by this *à posteriori* reasoning, although a conveyance may have been made in perfect good faith, for example, by a father as a proper gift to his child, yet, if he subsequently makes a conveyance of the same land for value, a fraudulent intent is imputed in the first transaction and it is condemned.

551. But this doctrine is as harsh as it is illogical. It has been repudiated by the United States Supreme Court and by the Supreme Court of Massachusetts, and it has been condemned by Chancellor Kent. The American rule is this: A voluntary conveyance is good as against a subsequent purchaser unless fraudulently made; and the fact that it was voluntary only creates a presumption against it which is to be weighed with all the other circumstances in determining whether in fact it was made with fraudulent intent.³

¹ [Jones v. Croucher, 1 S. & S. 315. Under this rule, a mortgage of real estate is not personal property: Clapp v. Leatherbee, 18 Pick. 131.]

² Snell's Eq. p. 85, 4th ed.

³ Cathcart v. Robinson, 5 Peters, 264, 280; Beal v. Warren, 2 Gray, 447; 4 Kent Com. 463.

CHAPTER XX.

CONSTRUCTIVE FRAUD (CONTINUED).

552. THE second general division under the head of constructive fraud consists of contracts and other dealings between parties holding a fiduciary or confidential relation to each other.

Equity looks upon all such transactions with the most jealous scrutiny. Some it condemns as void, — at the election of the party injured, — and others it will maintain only upon the clearest proof of fair dealing, a complete understanding, and an adequate consideration.¹

553. TRUSTEE AND CESTUI QUE TRUST. — A trustee is never allowed to purchase² the trust estate, or to deal with it on his own account. All such purchases or dealings are, at the election of the *cestui que trust*, absolutely void.³

Nor need it appear, in order to condemn the transaction, that the trustee made any profit out of it. Lord Thurlow incautiously stated in *Fox v. Mackreth*⁴ that this was necessary, but, later, Lord Eldon declared that he had Lord Thurlow's own authority for saying that the statement was erroneous. In *Ex parte Lacey*⁵ Lord Eldon laid down the

¹ [As a general rule, whenever a person in his individual capacity deals with himself in his fiduciary capacity, without the knowledge of his *cestui que trust* or principal, etc., the transaction is voidable at the election of the latter. If, however, the transaction is an open one, there is merely a *primâ facie* presumption that it is void. It may be valid if there is no fraud: *Miggett's Appeal*, 109 Pa. St. 520; *Pomeroy's Eq.* § 958.]

² [It is immaterial whether the purchase be made at public or pri-

vate sale: *Bechtold v. Reed*, 49 N. J. Eq. 111.]

³ [See *supra*, p. 170. Directors of a corporation are of course trustees under this rule: *Thomas v. Brownville R. R. Co.* 109 U. S. 522; *O'Conner & Co. v. Coosa Furnace Co.* 95 Ala. 614. And so of the projectors of a corporation as respects subscribers to stock: *Simons v. Vulcan Oil Co.* 61 Pa. St. 202; *Erlanger v. New Sombrero Phosphate Co.* L. R. 3 App. Cas. 1218.]

⁴ 2 Bro. Ch. Rep. 400.

⁵ 6 Ves. 625, 627.

rule in the most vigorous terms that in order to avoid such transactions it was not necessary that the trustee should have made any profit; one great reason for this, being the difficulty or impossibility in many cases of proving whether he had made a profit or not. His position as trustee had given him opportunity to know whatever could be known, and he was profiting by that knowledge.

554. AS TO AGENTS.—The same rule applies to an agent employed to sell an estate. He cannot be interested in the purchase, even if the sale is at auction, without previously informing his principal of his intention to be interested in the purchase and of the extent of his interest, and of all knowledge relating to the estate which he possesses.¹

555. So an agent to buy cannot be interested.² In *Kimber v. Barber*³ the defendant, knowing that the plaintiff wished to procure some shares in a certain company, represented that he could procure the shares at three pounds per share, and the plaintiff employed him to purchase them at that price. It turned out that the agent was himself the owner of the shares, having bought them at two pounds per share. He was held charged with the difference.

556. So, also, any surreptitious dealing between one principal to a transaction and the agent of the other principal is a fraud in equity, and entitles the latter to have the contract rescinded.⁴ No one can employ a traitor to his own pecuniary advantage.⁵

¹ *Dunne v. English*, L. R. 18 Eq. Cas. 524, is an instructive case upon this point. [*Fisher v. Concord R. R. Co.* 50 N. H. 200; *Ingle v. Hartman*, 37 Iowa, 274; *Tynes v. Grimstead*, 1 Tenn. Ch. 508. And so of a confidential agent not specially employed to sell: *Keith v. Kellam*, 35 Fed. Rep. 243. Where the property was bought by a broker's clerk, the broker being the selling agent, the clerk was held to be a trustee for the broker's employer: *Gardner v. Ogden*, 22 N. Y. 327. See, further, 2 Pomeroy's Eq. § 959.]

² [*Munson v. Syracuse R. R. Co.* 103 N. Y. 58; *Porter v. Woodruff*, 36 N. J. Eq. 174; *Gillett v. Peppercorne*, 3 Beav. 78; *Reed v. Norris*, 2 Myl. & Cr. 361. It is not material that the agent is a volunteer: *Conant v. Riseborough*, 139 Ill. 383.]

³ L. R. 8 Ch. App. 56.

⁴ [*Byrd v. Hughes*, 84 Ill. 174.]

⁵ *Panama & South Pacific Telegraph Co. v. India Rubber and Telegraph Works Co. L. R. 10 Ch. App. 515.*

557. The same rule governs executors and administrators. They cannot purchase or be interested in the purchase of the estate which they are administering. They stand toward it in the double relation of trustees and agents.¹

558. The distinction in all these cases between void and voidable contracts is this: The *cestui que trust*; the principal, as between principal and agent; or the heir, in case of executors or administrators, — may treat the fraudulent sale as binding or not, at his election: he may repudiate it, or sanction it and hold the trustee or agent, etc., for the amount of the purchase-money. But the *cestui que trust*, principal, or heir will not be held bound by any such election unless it was made with a full knowledge of all the facts, and under circumstances which exclude the presumption of deception or of undue influence.²

I have spoken of these sales as fraudulent sales, — and so they are in construction of law, without regard to the motive of the purchaser or to the consideration paid, because it is a purchase which no one standing in that particular relation to the property had a right to make.³

559. What one may not do directly, he may not do indirectly. And therefore the law cannot be evaded through the employment by the trustee or agent of a third person to make the purchase in his name, nor by an agreement with such person that if he will purchase the property, even at auction, the trustee (or agent) will take it from him at the same price.⁴

560. The restriction which we have thus far been considering is confined, of course, to the property which is the subject of the trust or agency. It does not prohibit dealings

¹ [Obert v. Obert, 10 N. J. Eq. 98; Scott v. Umbarger, 41 Cal. 410; Green v. Sargent, 23 Vt. 466.]

² See *supra*, p. 171.

³ [Tyler v. Sanborn, 128 Ill. 136.]

⁴ Stephen v. Beall, 22 Wall. 329, 340; Michoud v. Girod, 4 How. 503. [In Tracy v. Colby, 55 Cal. 67, it appeared that the judge of probate, who ordered a sale at auc-

tion of the property in question purchased it, through an agent, for himself. See, also, Winans v. Winans, 22 W. Va. 678; Bassett v. Shoemaker, 46 N. J. Eq. 538. Nor can a trustee purchase the trust property as agent for a third person: North Baltimore Ass'n v. Coldwell, 25 Md. 420.]

between persons who have been a trustee and *cestui que trust*, or principal and agent, if the relation no longer exists; provided there is no ground for imputing deception or undue influence.¹

561. There are certain other relationships which, although they do not render all transactions between the parties void or voidable as a matter of course (as is true of principal and agent), still import such confidence and such liability to abuse, that a court of equity applies the utmost scrutiny to all bargains between the parties.

The first of these relationships is that of PARENT and CHILD.² The whole law upon this subject is well stated by the Lord Chancellor in *Savery v. King*:³ "The doctrine of equity on this head is well established. The legal right of a person who has attained his age of twenty-one years to execute deeds and deal with his property is indisputable. But where a son, recently after attaining his majority, makes over property to his father without consideration, or for an inadequate consideration, a court of equity expects that the father shall be able to justify what has been done; to show, at all events, that the son was really a free agent; that he had adequate independent advice; that he was not taking an imprudent step under parental influence; and that he perfectly understood the nature and extent of the sacrifice he was making, and that he was desirous of making it."

562. GUARDIAN AND WARD. — All attempts of a guardian to become the purchaser of his ward's property while the relation exists are condemned for the reasons already given.⁴ All dealings whatever with the ward immediately

¹ [*Bucher v. Bucher*, 86 Ill. 377. An attorney, profiting by his knowledge of a former client's affairs, bought up claims against him after the relationship had ceased. He was adjudged to hold them as trustee for the client: *Carter v. Palmer*, 8 Cl. & F. 657.]

² [*Noble v. Moses*, 81 Ala. 530; *Wood v. Rabe*, 96 N. Y. 414; *Davis v. Dunne*, 46 Iowa, 684; *Ewing v.*

Wilson, 132 Ind. 223. See *Knox v. Singmaster*, 75 Iowa, 64, where a conveyance by a daughter to her father was supported. Such a conveyance, made as soon as the child became of age, was held to be void in *Whitridge v. Whitridge*, 76 Md. 54.]

³ 5 H. L. Cases, 627, 655.

⁴ [*Willey v. Tindal*, 5 Del. Ch. 194; *Carter v. Tice*, 120 Ill. 277.

upon or soon after his coming of age will be searched with the most jealous care, because, although the relation of guardian and ward has legally terminated, yet the presumption is that the ward is still to some extent under the influence of his former guardian and disposed to confide in him. A court of equity will therefore scrutinize a bargain made under these circumstances; and if there lurks in it any trace of undue advantage or inadequate consideration, the court will set it aside.¹

563. ATTORNEY AND CLIENT. — The relation of attorney and client² is a fiduciary one in the highest sense, and one, I am proud to add, that has very rarely been betrayed. Courts have sometimes been obliged to apply the rule which we have been considering to the protection of clients against dishonorable attorneys; but it is a satisfaction to know that they were lawyers sitting as judges who ordained this salutary rule, and who have rigidly enforced it, both for the honor of the profession and the protection of the public.

The rule as regards attorneys may have two applications. First, in respect to purchases of property from clients. There is not in this case the positive incapacity to purchase which exists between a trustee and his *cestui que trust*; that is, the transaction is not necessarily voidable at the mere election of the client.³ If it is perfectly fair and honest, it will be upheld, although the client may have become dissatisfied with it.⁴

But inasmuch as the parties stand in a relation which gives or may give the solicitor an advantage over the client,

So of a gift from ward to guardian:
Wade v. Pulsifer, 54 Vt. 45.]

¹ [Wickiser v. Cook, 85 Ill. 68.
So of a will made in favor of a
guardian: Garvin v. Williams, 44
Mo. 465. The burden of proof is
of course on the guardian to show
that a conveyance to him was fair
and free: Gale v. Wells, 12 Barb.
84; McConkey v. Cockey, 69 Md.
286. As to a final settlement of ac-
counts between guardian and ward,
see Gillett v. Wiley, 126 Ill. 310.]

² [As to what constitutes the re-
lationship, see Gott v. Brigham, 41
Mich. 227; Stout v. Smith, 98 N. Y.
25; Beedle v. Crane, 91 Mich. 429.]

³ [Morrison v. Smith, 130 Ill.
304.]

⁴ [Dunn v. Record, 63 Me. 17.
Trotter v. Smith, 59 Ill. 240. If
however, the client does not know
that the attorney is the purchaser,
the sale is voidable, whatever the
circumstances: McPherson v. Watt,
L. R. 3 App. Cas. 254.]

the burden lies on the solicitor to prove that the transaction is fair.¹

Lord Eldon thus stated the rule:² "If [the attorney] will mix with the character of attorney that of vendor, he shall, if the propriety of the contract comes in question, manifest that he has given her [his client] all that reasonable advice against himself that he would have given her against a third person." (Page 278.) Again, he said (page 271): "An attorney buying from his client can never support it unless he can prove that his diligence to do the best for the vendor has been as great as if he was only an attorney dealing for that vendor with a stranger."

In *Savery v. King*³ this opinion was cited with approbation, and the court added: "In order to sustain his purchase [the solicitor] must show not only that he gave the utmost value for the estate, but farther that no one of the circumstances likely to influence [the client] in his determination to concur or not to concur in the sale was kept from him."

564. In *Luddy's Trustee v. Peard*⁴ it was held that a solicitor buying an estate from his client was bound to communicate to him all information affecting it which he had derived as solicitor.

To the same effect is *Baker v. Humphrey*,⁵ where it was laid down that an attorney cannot use, to the injury of the client in the matter to which his employment related, any information acquired by him in the course of that employment. Thus, it was held that, where an attorney had been employed in drafting papers in the purchase of an estate, he could not acquire title thereto, or an interest therein, adverse to his client.⁶

565. The second instance in which this rule may apply to

¹ [Dunn v. Dunn, 42 N. J. Eq. 431; Merryman v. Euler, 59 Md. 588. For a case where, the relationship having terminated, the attorney was allowed to purchase, see *Tancere v. Reynolds*, 35 Minn. 476. See, also, *supra*, p. 14.]

² *Gibson v. Jeyes*, 6 Ves. 266.
³ 5 H. L. Cas. 627, 666.

⁴ L. R. 33 Ch. D. 500.

⁵ 101 U. S. 494, 500.

⁶ *Briggs v. Hodgdon*, 78 Me. 514; [Smith v. Brotherline, 62 Pa. St. 461. The rule applies to a searcher of title, although he may not be an attorney: *Vallette v. Tedens*, 122 Ill. 607.]

solicitors is that of gifts to them by a client. All gifts *inter vivos* will be viewed with disapproval if there is any indication of undue influence, or any lack of proper advice and warning on the part of the client.¹

566. *A fortiori* will the law look with suspicion upon a gift given in a will drawn by the solicitor himself. The apprehension is that the solicitor may have used the influence of his position improperly to induce the gift to himself. No lawyer should place himself in such a position; and whenever a client wishes to express his gratitude for faithful professional services, counsel should have that part at least of the client's will drawn by a disinterested hand.²

In *Whipple v. Barton*,³ it was held that, in case of a gift by a client to his attorney, the legal presumption is against its validity, and that the attorney is bound to show that it was made with full knowledge and without undue influence.

567. As we have seen from the two cases cited in another connection, the relation of a SPIRITUAL ADVISER AND HIS DISCIPLE,⁴ and also of PHYSICIAN AND PATIENT,⁵ may be, if not strictly fiduciary, yet of so confidential a nature as to call for the scrutiny and protection of a court of equity.⁶

568. SPIRITUALISTIC MEDIUMS. — In modern times another relationship between men has arisen, of which the law has been obliged to take cognizance, namely, that of a spiritualistic medium and his disciple.⁷

In *Lyon v. Home*⁸ it appeared that the defendant, a noted medium, had wheedled an old lady, a widow of seventy-five, out of a large amount of property — a present gift of

¹ *Broun v. Kennedy*, 4 De G., J. & S. 217, is a strong illustration of the disfavor with which courts of equity regard such transactions; [*Nesbit v. Lockman*, 34 N. Y. 167.

In England the rule is even more strict. See *Morgan v. Minnett*, L. R. 6 Ch. D. 638, 645.]

² [*Walker v. Smith*, 29 Beav. 394; *Matter of Smith's Will*, 95 N. Y. 516; *Richmond's Appeal*, 59 Conn. 226.]

³ 63 N. H. 613.

⁴ [*Huguenin v. Baseley*, 14 Ves. 573; *Corrigan v. Pironi*, 48 N. J. Eq. 607; *Pironi v. Corrigan*, 47 N. J. Eq. 135.]

⁵ [*Cadwallader v. West*, 48 Mo. 483; *Billage v. Southee*, 9 Hare, 534; *Audenreid's Appeal*, 89 Pa. St. 114.]

⁶ *Allcard v. Skinner*, L. R. 36 Ch. D. 145.

⁷ [*Connor v. Stanley*, 72 Cal. 556; *Leighton v. Orr*, 44 Iowa, 679.]

⁸ L. R. 6 Eq. Cas. 655.

thirty thousand pounds, and a settlement of thirty thousand pounds more after her death — by pretending to put her in communication with her deceased husband, to whose memory she was much attached. One of the communications was to the effect that the old lady should adopt Home as her son and heir. Upon the facts proved, the court held that the relation existing between the plaintiff and defendant implied the exercise of dominion and influence by the latter over the former, and they set aside the gift as void.

569. A SUITOR AND HIS BETROTHED. — The last relation to which I shall refer, where courts have been called upon to interpose, is that of a suitor and the woman to whom he is engaged. This relation is so confidential, and imports so much influence of one over the other, that, if the man under these circumstances has, in contemplation of marriage, secured from the woman a conveyance of property or other pecuniary advantage, the presumption will be that it was obtained by undue influence and abuse of confidence.¹ This rule does not prevent proper marriage settlements for the benefit of the future husband as well as the wife, where the woman acts under proper advice, and with the assistance of such counsel from friends and a legal adviser as is usual in such cases.²

In *Page v. Horne*³ a proper settlement had been made with advice of counsel. The intended husband then induced the woman to revoke the settlement, — the effect of which was to vest her property in the husband immediately upon the marriage, it being personal estate. The Master of the Rolls held the deed of revocation to be void and confirmed the settlement.⁴

¹ [*Lamb v. Lamb*, 130 Ind. 273.]

² [*Neely's Appeal*, 124 Pa. St. 406.]

³ 11 Beav. 227. See, on the general subject, *Cooke v. Lamotte*, 15 Beav. 234; *Hoghton v. Hoghton*, 15 Beav. 278.

⁴ [For other cases of confidential relationship, where the conveyance was set aside, see *Farmer v. Farmer*,

39 N. J. Eq. 211 (husband and wife); *Harvey v. Mount*, 8 Beav. 439 (sisters); *Tate v. Williamson* L. R. 2 Ch. App. 55 (uncle and nephew); *Worrall's Appeal*, 110 Pa. St. 349 (child and one standing *in loco parentis*); *Shipman v. Furniss*, 69 Ala. 555 (a man and his mistress); *Brooks v. Martin*, 2 Wall. 70; and *Short v. Stevenson*, 63 Pa.

Frauds.—Limit of the Jurisdiction.

570. The question remains to be considered, what are the limits of equity jurisdiction in cases of fraud? The precise limits of this jurisdiction are not very accurately defined. Nor is there entire concurrence upon the subject between the courts of England and of the United States. The practice of the English courts in this respect is much more liberal than that commonly adopted in this country, and they do not hesitate to entertain many suits jurisdiction in which has been declined by our own courts.

In considering this topic it is important to bear in mind at the outset that fraud (unlike trusts, for example) is a subject-matter over which courts of law and courts of chancery have concurrent jurisdiction; and therefore, as in every case of concurrent jurisdiction (that is to say, in every case where some remedy may be had at law), the only ground for jurisdiction in equity is that the remedy at law is not adequate and complete.

In default of assistance from the text-books, which are somewhat meagre upon this point, I have endeavored to extract from the cases an outline of the jurisdiction.

571. Courts of equity will take jurisdiction in cases of fraud, as follows:—

(a) Whenever a deed or other instrument fraudulently obtained or otherwise void is outstanding, and no suit at law is either pending or can immediately be brought to determine its validity, equity will entertain a suit to cancel such instrument.¹

This is true whether the instrument sought to be annulled is a deed, as in *Martin v. Graves*;² or a promissory note, as

St. 95 (partners). See, also, on the general subject, *Kyle v. Perdue*, 95 Ala. 579; *Reed v. Peterson*, 91 Ill. 288; *Tompkins v. Hollister*, 60 Mich. 470; *Fisher v. Bishop*, 108 N. Y. 25.]

¹ [*Jones v. Jones*, 120 N. Y. 589; *Brown v. Krause*, 132 Ill. 177; *An-*

derson v. Hammon, 19 Oregon, 446; *Blair v. Chicago & Alton R. R. Co.* 89 Mo. 383. It is otherwise, of course, where the invalidity of the deed appears on its face: *Town of Venice v. Woodruff*, 62 N. Y. 462.

See, also, *supra*, p. 41.]

² 5 Allen, 601.

in *Fuller v. Percival* ;¹ or a policy of Insurance, as in *Commercial Mutual Insurance Co. v. McLoon*,² and in *Traill v. Baring* ;³ or any other agreement the continued existence of which operates as a fraud upon and injury to the plaintiff.⁴

(b) So, also, where an instrument has been forged and is outstanding, equity will entertain a suit to cancel it.⁵

(c) Where a deed or other instrument has been altered fraudulently, equity will entertain a suit to reform it in favor of the injured party.

In *Metcalf v. Putnam*⁶ a deed had been drawn correctly according to the agreement of the parties, but the grantor without the knowledge of the grantee afterward struck out an important covenant, and the grantee, in ignorance of this, accepted the deed. The court reformed the deed by restoring the covenant, upon oral proof of the fraud.

(d) Whenever a judgment has been obtained by the fraud of the other party, and no opportunity for a new trial or review exists, equity will enjoin the party from enforcing the fraudulent judgment.⁷

A court of equity has no jurisdiction to correct the errors or to supervise the doings of a court of law, nor to retry a case which has been tried at law. But if one party to a suit, either at law or equity, by some trick or other fraudulent device practised upon the court or upon his adversary, has prevented a fair trial upon the merits, a court of equity will enjoin the party from availing himself of a judgment thus unjustly obtained. This jurisdiction does not depend upon, and has not necessarily anything to do with, the intrinsic merits of the case; but it has to do with the fair trial of the case.

For example, if a plaintiff has obtained a judgment by default by representing to the defendant that he did not intend to enter the suit, or if he has succeeded in prevailing

¹ 126 Mass. 381.

² 14 Allen, 351.

³ 4 De G., J. & S. 318.

⁴ See *Jones v. Bolles*, 9 Wall. 364.

case the instrument was a certificate of marriage; [*Remington Co. v. O'Dougherty*, 81 N. Y. 474.]

⁵ 9 Allen, 97.

⁷ *Metcalf v. Williams*, 104 U. S.

⁶ *Sharon v. Hill*, 20 Fed. Rep. 1; 93; *United States v. Throckmorton*, s. c. 26 Fed. Rep. 337. In this 98 U. S. 61.

at the trial by fraudulently keeping away the defendant's witnesses, — these are instances of fraud which will render the judgment liable to be relieved against in a court of equity. The specific relief is, not to set aside the judgment (because a court of equity has no power over the judgments of a court of law), but to enjoin the guilty party from ever enforcing the judgment.

(e) Whenever the object of the bill is to rescind a fraudulent transaction, and to reinstate the plaintiff in a title or in the possession of property fraudulently obtained from him, equity will take jurisdiction.

The only exception to this rule is where the matter involved is a personal chattel, the repossession of which may be obtained by a writ of replevin.¹

(f) Whenever one object of the bill is to charge the defendant with the profits of a fraudulent transaction, thus involving the necessity of discovery and account, equity will take jurisdiction.²

(g) In cases of constructive fraud, as a general rule, equity will take jurisdiction. That is to say, in all cases where the transaction is condemned because it operates as a fraud upon third persons, or is against public policy, or where it is condemned on account of the fiduciary or confidential relations of the parties.

And this equity will do, although the wrong-doer may have transferred the property to an innocent purchaser, so that the only relief it can give is in the way of damages. This is especially true of all cases of undue influence, for which there is no relief at law, but only in equity.³

572. In all other cases where the object of the bill is simply to recover compensation for the alleged fraud, — whether for the value of property of which the plaintiff has been deprived, or for damages which he may have sustained by some fraudulent representation, — the general rule in this country is not to entertain the suit, upon the ground that

¹ [Where, however, it is impossible to replevin, because the holder refuses to produce the chattel, a bill in equity will lie. See *infra*, p. 422.]

² [Bay City Bridge Co. v. Van Etten, 36 Mich. 210.]

³ Allcard v. Skinner, L. R. 36 Ch. D. 145, 181.

the plaintiff has an adequate and complete remedy at law.¹ But in England such suits are entertained in equity, — suits, that is, where the only relief to be given is in the form of damages.²

573. Since *Suter v. Matthews*, *supra* (which laid down for Massachusetts the rule just stated), was decided, the statute of 1877 (now Pub. Stats. ch. 151, § 4) has been passed, which runs as follows: —

“The court shall also have jurisdiction in equity of all cases and matters of equity cognizable under the general principles of equity jurisprudence, and in respect of all such cases and matters shall be a court of general equity jurisdiction.”

There can be no question that this act conferred upon the Supreme Judicial Court the most complete equity jurisdiction. But did it in any degree alter or affect the application of the rule that the court cannot take jurisdiction where there is an adequate remedy at law? That question remains to be answered by the court itself. I trust that the court will be led to take the more liberal view of its jurisdiction, and to hold that in most cases of fraud, and especially in cases like that of *Suter v. Matthews*, a court of chancery is the appropriate tribunal. It cannot be doubted that the act in question authorizes the court to extend its jurisdic-

¹ *Ambler v. Choteau*, 107 U. S. 586. Extreme cases are: *Bazard v. Houston*, 119 U. S. 347; *Suter v. Matthews*, 115 Mass. 253. [In *Suter v. Matthews* the bill alleged that the defendant had obtained from the plaintiff by fraud a negotiable note, some stock as collateral, and a sum of money, and prayed for the surrender of the note, the return of the stock, and the repayment of the money. It appeared that the defendant had begun a suit upon the note against the plaintiff, and that the stock had been sold — the amount which it brought being credited on the note — and bought in by the plaintiff. Under

these circumstances the bill was disallowed, on the ground that the plaintiff had a sufficient remedy at law. See, also, *Paton v. Majors*, 46 Fed. Rep. 210; *Miller v. Scammon*, 52 N. H. 609. Neither will a court of equity set aside a will on the ground of fraud, the probate court alone having jurisdiction to establish or set aside wills: *Gaines v. Chew*, 2 How. 619, 645. See, also, *Adams v. Adams*, 22 Vt. 50; *Allen v. McPherson*, 1 H. L. Cas. 191.]

² [*Slim v. Croucher*, 1 De Gex, F. & J. 518; *Leather v. Simpson*, L. R. 11 Eq. 398; 2 *Pomeroy's Eq.* § 912 and note.]

tion to all cases over which the jurisdiction of chancery in England is well established. The case of *Dole v. Wool-dredge*¹ has an intimation to this effect, and it is otherwise inconsistent with *Suter v. Matthews*.

574. Inasmuch as fraud is a subject-matter of which courts of law and of chancery have concurrent jurisdiction, a plaintiff may sue, if he so prefers, in a court of law and get such damages as that court can give him, with one exception, and that relates to instruments under seal.

The rule established in England, in the federal courts, and in many of the state courts, in reference to sealed instruments obtained by fraud is this: —

(1) If the allegation is that the party did not knowingly execute the instrument, — that it was misread to him, or one paper was fraudulently substituted for another, so that it was never his deed, — that defence may be made at law. The fraud in that case goes to the execution of the instrument (as it is said), and is always admissible as a defence at law.

(2) But if the allegation is that fraudulent representations were made, or that any other fraudulent practice was resorted to, by which the party was induced to execute the instrument, he knowing, however, what the instrument was, such a defence is not open at law, but the party must go into equity for a cancellation of the instrument. Such misrepresentation may be, for instance, as to the value of the property, or as to any other inducement to the transaction which is the subject of the agreement.

Now, in the first case the alleged fraud, if proved, shows that the alleged instrument never had any legal existence. The party, in legal effect, never signed it, and that is the end of the matter. *Non est factum*.

But in the second instance the alleged fraud goes not to the execution, but only to the consideration of the instrument. The alleged fraud may or may not affect the whole consideration; and therefore, it is said, the jurisdiction lies solely in equity, because a court of equity alone has power to set aside the instrument wholly or in part, and upon such terms as under the circumstances may be just and equitable.²

¹ 135 Mass. 140; 142 Mass. 161.

² *Hartshorn v. Day*, 19 How. 211,

575. I do not understand that this rule has been adopted in Massachusetts.¹ Any fraud in obtaining a sealed instrument, although it affects merely the consideration, is in that State a good defence at law to the instrument.

In any case, if the injured party chooses to go into equity (as he undoubtedly may, because an outstanding fraudulent instrument not sued upon is always ground for relief in equity), the court can cancel it *in toto*, or upon such terms as it may think proper.

222, 223; *George v. Tate*, 102 U. 95, and, further, *Herrin v. Libbey*,
S. 564. 36 Me. 350; *Hancock's Appeal*, 34

¹ [See *Hazard v. Irwin*, 18 Pick. Pa. St. 155.]

CHAPTER XXI.

ACCOUNT.

576. ACCOUNT is one of those subjects of which there is, to a certain extent, concurrent jurisdiction at law and in equity. It is therefore important to ascertain in what cases of account equity will take jurisdiction, the ground of this jurisdiction being that in the particular case there is no plain, adequate, and complete remedy at law.¹

The action of assumpsit is the remedy provided by the common law for the recovery of simple debts. It is no objection to this form of remedy, and it is no sufficient reason for seeking the aid of a court of equity, that the plaintiff's claim consists of a large number of items. It is, of course, very inconvenient to undertake the proof of such a claim before a jury; but this inconvenience is in a measure obviated by the power which most common-law courts now possess, where the plaintiff's demand involves several items, to send the case to an auditor to examine and state the account and report thereon to the court. His report is *primâ facie* correct, and so far evidence in behalf of the party in whose favor it is made.

There are, however, several classes of cases relating to accounts where a suit at law is rightly deemed inadequate, and where jurisdiction in equity is well settled.

577. FIDUCIARY RELATIONS. — Wherever a fiduciary relation exists, the right to an account in equity is well settled.² For example, as between principal and agent the principal has a right to call the latter to account in equity.³ One

¹ [Carter v. Bailey, 64 Me. 458; Barnes v. Dow, 59 Vt. 531; Hale v. American Freehold Loan, etc., Co. v. Jefferson, 69 Miss. 770; Clarke's Appeal, 107 Pa. St. 436; Gloninger v. Hazard, 42 Pa. St. 389. See Mitford's Eq. Pl. 120, 123; 1 Spence's Eq. 649.]

² [But see Knotts v. Tarver, 8 Ala. 743; King v. Rossett, 2 You. & Jer. 33; Navalshaw v. Brownrigg,

³ [Petrie v. Torrent, 88 Mich. 43; 2 De G., M. & G. 441.]

reason of this is said to be that the principal necessarily leaves it to the agent to keep a correct account of his doings, and therefore the principal requires, or is entitled to a discovery of, that account from the agent.¹ Another ground is that the agent, if not strictly a trustee, is at least a *quasi* trustee.²

578. But the converse of this is not true. Ordinarily, the agent is not entitled to go into equity against the principal, because, as he keeps or ought to keep an account of all his transactions in behalf of the principal, he needs no discovery from him; he does not require the peculiar aid of a court of equity, for his remedy is complete at law.³

579. If, however, there is any complication in the accounts, and not a mere claim for a balance due as shown by his own account, relief may be sought in equity upon the distinct ground of complexity of accounts, as we shall see later.⁴

580. Again, if the compensation of the agent depends upon the profits of the business, *i. e.* if his salary is to be equal to a certain share of the profits, the agent ordinarily has a right to a bill in equity against the principal to ascertain the amount of the profits, and consequently the amount due him.⁵

But, as I have said, the general rule is that a principal is entitled to relief in equity against the agent, but the agent is not entitled to such relief against the principal.

581. In the other cases of fiduciary relation, such as trustee and *cestui que trust*, partners, etc., the jurisdiction in equity for an account is well established on grounds peculiar to those relations, as well as upon the distinct ground of fiduciary relation.⁶

¹ [Marvin v. Brooks, 94 N. Y. 71; J. & S. 1; [Lynch v. Willard, 6 Colonial Mortgage Co. v. Hutchinson Mortgage Co. 44 Fed. Rep. 219; 87 Mich. 85.] Webb v. Fuller, 77 Me. 568.]

⁴ [Buel v. Sely, 5 Ill. App. 116.]

² Foley v. Hill, 2 H. L. Cases, 28, 35, 36; [Vilwig v. B. & O. R. R. Co. 79 Va. 449; Rippe v. Stogdill, 61 Wis. 38.]

⁵ Hallett v. Cumston, 110 Mass. 32; Ferry v. Henry, 4 Pick. 75; [Bentley v. Harris, 10 R. I. 434; Shepard v. Brown, 4 Giff. 208.]

³ Padwick v. Stanley, 9 Hare, 627; Smith v. Leveaux, 2 De G.,

⁶ [Cochrane v. Adams, 50 Mich. 16; Suydam v. Bastedo, 40 N. J.

582. **BANKERS AND THEIR CUSTOMERS.** — It has been determined in England that the relation between banker and customer is not a fiduciary one, and will not justify a bill in equity for an account by the customer against the banker, unless there is complexity in the accounts, or some other distinct reason. It cannot be maintained simply on the ground of the relation of the parties. This was settled in the leading case of *Foley v. Hill*.¹

A banker is one who receives money from the depositor, his customer, and pays the cheques which the customer draws upon him. But the money, as soon as it is paid in, ceases to be the money of the depositor and becomes the money of the banker, and he is free to use it as he will. The relation, therefore, between them is simply that of debtor and creditor, with the understanding that the banker shall honor his customer's cheques until he has paid out a sum equal to that deposited. Hence, unless there is some other reason for seeking the aid of a court of equity, the remedy of one against the other is at law.² But the case of *Foley v. Hill* affirms the doctrine that the relation between principal and factor, and that between principal and agent, is a fiduciary one, and entitles the principal to an account in equity.

583. **DISCOVERY.** — The second class of cases where a bill for an account will lie are those where the plaintiff is entitled to some discovery from the defendant in reference to the account.³ Judge Story thus states the rule: "Courts of equity will also entertain jurisdiction in matters of account, not only when there are mutual accounts, but also when the

Eq. 433 (executor); *State v. Diley*, 64 Md. 314 (the case of an administrator); *Berry v. Whidden*, 62 N. H. 473 (tenant in common); *Darrah v. Boyce*, 62 Mich. 480. But there can be no suit in equity where the plaintiff merely seeks to recover his share of an ascertained sum: *Pico v. Columbet*, 12 Cal. 414.]

¹ 2 H. L. Cases, 28, 36.

² [So the relation of an insurance company (although conducted on

the tontine plan) and one insured is merely that of debtor and creditor, and the action against the company, when the policy becomes due, must be at law. *Uhlman v. N. Y. Life Ins. Co.* 109 N. Y. 421; *Hunton v. Equitable Society*, 45 Fed. Rep. 661. But see *Pierce v. Equitable Co.* 145 Mass. 56.]

³ [*Gordon v. Clarke*, 10 Fla. 179. But see *Pomeroy's Eq.* § 1421 note, and § 223 *et seq.*]

accounts to be examined are on one side only, and a discovery is wanted in aid of the account and is obtained.”¹ In *Fowle v. Lawrason*² Chief Justice Marshall stated that one of the cases in which equity has clear jurisdiction on a bill for an account is where “some discovery should be required.”

584. The right to such discovery exists where the account from its nature is particularly within the knowledge of the defendant,³ or where, from privity of contract or otherwise, it was the duty of the defendant to keep the account.⁴

Thus, for instance, if a manufacturer has agreed to pay to a patentee for the use of his invention so much per yard for every yard of cloth made by him with the aid of the patented improvement, there from the nature of the case the defendant alone knows the number of yards which he has thus manufactured, and, if he refuses to give a true statement of them, the patentee is entitled to discovery and an account in equity, although there may have been no express agreement that he should keep such an account. If he has also agreed, as is usually the case, to keep and render such an account, then he is under a twofold obligation to do so, and the right to a suit in equity for an account is clear.⁵

585. If, however, in a case of this nature, where the right to go into equity is predicated on the right to discovery, the plaintiff in his bill waives the oath of the defendant, he thus in effect waives his right to any discovery; for an answer not under oath is not discovery in the equity sense, and therefore his bill will be dismissed.⁶

586. In *Foley v. Hill*, *supra*, there are some observations tending to the conclusion that the mere right to or necessity for discovery will not justify a bill for an account; that the party must first bring his action at law, then go to equity for his discovery, and finally with the aid of that discovery,

¹ 1 Story's Eq. § 458.

² 5 Peters, 495, 503.

³ [Tateum v. Ross, 150 Mass. 440.]

⁴ [Warren v. Holbrook, 95 Mich. 185.]

Rep. 100; McKay v. Mace, 23 Fed.

Rep. 76; Cook v. Bidwell, 8 Fed.

Rep. 452; Pratt v. Tuttle, 136 Mass. 233; [Adams' Appeal, 113 Pa. St. 449.]

⁶ Badger v. McNamara, 123 Mass.

⁵ White v. Lee, 4 Fed. Rep. 916; 117; [McCulla v. Beadleston, 17 R. Pope Mfg. Co. v. Owsley, 27 Fed. I. 20.]

prove his case at law. But if Judge Story is right, this is not the true doctrine either in England or in this country, and it certainly is not the doctrine of Massachusetts.

In *Bartlett v. Parks*¹ the court said: "A jury is an unsuitable tribunal for adjusting matters of account, and, although the law authorizing a reference to an auditor . . . has removed some difficulties, still accounts generally cannot be conveniently thus settled. The plaintiff in the present case is entitled to a discovery, and to the production of the defendant's books; and it would be inconvenient and unreasonable that he should be compelled to resort to a court of equity for a discovery and to a court of law for relief, when the whole case might be settled and decided most beneficially for both parties by a court of equity."

The rule of the United States Supreme Court is that, if the plaintiff is entitled to discovery and obtains it, the court will entertain the bill for relief also.

587. CASES OF MUTUAL ACCOUNTS. — As to these cases Judge Story thus states the rule: "In cases of mutual accounts founded in privity of contract, this doctrine [of jurisdiction in equity] is, in the English courts, acted upon in the most ample manner in our day, without any limitation, as it certainly is fully maintained in America."²

It is very important, however, to understand what is meant by "mutual accounts." Two independent accounts between A and B — A's account consisting of goods sold to B, and B's account of goods sold to A, or of payments made to A — do not constitute mutual accounts. They are separate, independent accounts, and each man can sue on his own account.³ Nor is an account on one side, consisting of payments made by A for B, a mutual account, nor one of goods sold by A to B. Here, also, all that A has to do is to sue on his own account.⁴ For example, the account between a banker and his customers is not a mutual account.⁵

¹ 1 Cush. 82, 86.

² 1 Story's Eq. § 457.

³ [McCulla v. Beadleston, 17 R. I. 20; Haywood v. Hutchins, 65 N. C. 574.]

⁴ [Avery v. Ware, 58 Ala. 475; Passyunk Building Association's Appeal, 83 Pa. St. 441.]

⁵ Foley v. Hill, *supra*.

588. But if A has made payments to or on account of B, and B has also made payments to or on account of A, that is a case of mutual account. It is an interchange of payments. A mutual account was thus defined by Sir George Turner, then Vice-Chancellor,¹ and his definition has frequently been cited with approbation: "I understand a mutual account to mean not merely where one of two parties has received money and paid it on account of the other, but where each of two parties has received and paid on the other's account."²

Two bankers who are correspondents, each making payments for the other, furnish a good illustration of mutual accounts.

589. Where several persons (more than two) representing different and distinct interests are concerned in the account, relief is necessarily found in equity and not at law. To sustain a suit on an account at law, the plaintiffs, if more than one, must all have one and the same interest, — it must be a joint interest; and so on the other hand all the defendants, if more than one, must have one and the same interest on their side of the account. They must in legal effect be as only one person. But it is not so in equity. Matters of account may grow out of a transaction where A has one interest peculiar to himself, B another interest, and C still a third interest. The common law cannot deal with this case, and the remedy necessarily is in equity.

590. The fifth instance where a bill for an account will lie is where there is great COMPLEXITY in the accounts, although it may be that only two persons are interested in them.³ The ground of jurisdiction where the accounts are complicated from the multiplicity of the transactions involved, or

¹ *Phillips v. Phillips*, 9 Hare, 471. See, also, *Porter v. Spencer*, 2 Johns. Ch. 169; *Dinwiddie v. Bailey*, 6 Ves. 136.

² [See, further, *State v. Churchill*, 48 Ark. 426; *Garner v. Reis*, 25 Minn. 475; *Porter v. Spencer*, 2 Johns. Ch. 169; *Salter v. Ham*, 31 N. Y. 321.]

³ [*Governor v. McEwen*, 5 Humph. 241; *Colonial, &c. Co. v. Hutchinson, &c. Co.* 44 Fed. Rep. 219; *Coffman v. Sangston*, 21 Gratt. 263; *Printup v. Mitchell*, 17 Ga. 558; *Seymour v. Long Dock Co.* 20 N. J. Eq. 396; *Jackson v. King*, 82 Ala. 432.]

from other circumstances, is simply that a court of law at *nisi prius* cannot, with the means which it has, properly examine and adjust an account. But this jurisdiction in equity is well established. It grows out of the necessity of the case.

In *O'Connor v. Spaight*¹ Lord Redesdale said: "This is a principle on which courts of equity constantly act by taking cognizance of matters which, though cognizable at law, are yet so involved with a complex account that it cannot properly be taken at law."

This doctrine was also very distinctly affirmed in *Foley v. Hill*,² where Lord Chancellor Cottenham said: "The bill in this case, as is usual in cases of this description where bills state matters of account, and where there is concurrent jurisdiction at law and equity, alleges that the account is complicated and consists of a great variety of items, so that it could not be properly taken at law. If that allegation had been made out it would have prevented the necessity of considering any other part of the case. But that allegation has entirely failed of proof." And after stating that the whole account consisted of a single deposit by the customer on one side, and two cheques drawn against it on the other, the Lord Chancellor adds: "Therefore there is certainly no such account as would induce a court of equity to maintain jurisdiction as if the question had turned entirely upon an account so complicated and so long as to make it inconvenient to have it taken at law."

591. What constitutes such complexity in any given case is a matter addressed entirely to the discretion of the court,³ and about which no definite rule can be laid down. Each case must depend upon its own circumstances. The mere fact that the items, though homogeneous, are numerous, will not constitute complexity. But where the parties have had various dealings of different natures or under different contracts involving distinct accounts, and especially where a true

¹ 1 Sch. & Lef. 305.

² 2 H. L. Cases, 28, 34.

³ [Fair v. Stickney Farm Co. 35 Minn. 380; Warner v. McMullin,

131 Pa. St. 370; Wooley v. Osborne, 39 N. J. Eq. 54; White v. Hampton, 10 Iowa, 238, 245.]

accounting will involve an inquiry into their transactions with third persons, it may be said in a general way that such complication exists as will justify the aid of a court of equity.¹ For some instances where a bill for an account was not allowed,² see *Blood v. Blood*, 110 Mass. 545; *Ward v. Peck*, 114 Mass. 121; *Fowle v. Lawrason*, 5 Peters, 495; *Moxon v. Bright*, L. R. 4 Ch. App. 292.

592. TORT FEASORS. — No bill for an account will lie against a mere trespasser or wrong-doer except as incidental to some other relief.

It was formerly said that two exceptions existed to this rule, the cutting down of timber and the working of mines. In each of these cases, it was said, the true owner had a right to go into equity for an account from the trespasser as to the amount of timber which he had felled, or the amount of coal or ore that he had mined. As to felled timber, the rule seems to be now well settled in England that a bill will not lie for an account, except when the account is asked as incident to an injunction, and that when the plaintiff has no right to an injunction he has no right to an account, his remedy being at law alone. It was so held in *Higginbotham v. Hawkins*.³

593. By parity of reasoning, the same rule would apply to the unlawful working of mines. But in *Parrott v. Palmer*⁴ the Lord Chancellor came to a different conclusion, holding "that as to them the party may have an account even in cases where no injunction would lie." And Mr. Smith (*Principles of Equity*, p. 647) states that to be the present law of England upon this subject.

594. LETTERS PATENT. — It is now well settled that a bill for an account of damages or profits will not lie against an infringer except where the plaintiff is entitled to the

¹ *Mitchell v. Great Works Milling Co.* 2 Story R. 648; *Pacific R. R. Co. v. Atlantic & Pacific R. R.* 20 Fed. Rep. 277; *Pierce v. Equitable Life Assurance Co.* 145 Mass. 56; *Southeastern Railway Co. v. Brogden*, 3 MacN. & G. 8, 23.

² [*Jewett v. Bowman*, 29 N. J. Eq. 174. See, also, cases *supra*, p. 312.]

³ L. R. 7 Ch. App. 676.

⁴ 3 Myl. & K. 632.

equitable relief of injunction.¹ If the patent has expired when the bill is brought, and consequently the plaintiff can have no injunction, the bill will not be entertained simply for an account of plaintiff's damages, and his only remedy is at law. This was settled in the leading case of *Root v. Railway Co.*²

The same rule prevails in England. Where a bill was brought so soon before the expiration of the patent that no preliminary injunction could have been obtained, the court dismissed the bill as a mere device to transfer to the court of equity that jurisdiction to award damages which properly belongs to a court of law.³

595. Where, however, the bill is brought in good faith a reasonable time before the expiration of the patent, and by reason of protracted litigation the patent has expired before the termination of the suit, the court will not dismiss the bill, but will give the plaintiff a decree for an account. In one case, where the bill was brought fifteen days before the expiration of the patent, the bill was sustained under special circumstances.⁴

Upon an expired patent or copyright no bill in equity will lie for an account, and the only remedy is at law for damages. The plaintiff must prove his case, *i. e.* the amount to which the defendant has infringed, as best he can. He may file interrogatories in the suit at law, calling upon the defendant to state the number of articles embodying the plaintiff's invention or violating his copyright, which he has sold.

596. DEFENCE, — ACCOUNT STATED. — There is one defence peculiar to a bill for an account which deserves a very brief consideration, and that is the defence of an "account stated." The meaning of this is that the parties have al-

¹ [Nor can the owner of the patent bring a bill in equity for an accounting of royalties due to him from licensees. *Washburn Manufacturing Co. v. Freeman Wire Co.* 41 Fed. Rep. 410.]

² 105 U. S. 189.

³ *Betts v. Gallais*, L. R. 10 Eq. 392; *Mershon v. Pease Furnace Co.* 23 Blatch. 329.

⁴ *Clark v. Wooster*, 119 U. S. 322. See, also, *Toledo Mower & Reaper Co. v. The Johnston Harvester Co.* 23 Blatch. 332.

ready come to an accounting, and therefore that there is no necessity for an account in equity.¹ If this defence be true, if such an accounting has taken place and a balance has been found to be due to one or the other, there is no need for any relief in equity, because the party in whose favor the balance exists has a complete remedy at law by a suit to recover the ascertained balance.

597. **ERROR IN ACCOUNT.** — But, to go one step further, although an account has thus been stated and a balance arrived at, it may turn out that some error was made in the accounting, and that if this error were corrected the balance would be diminished, or would be the other way. What is the redress in such a case? The party seeking to establish the error may and should bring a bill setting forth the alleged errors, praying that they may be corrected, and praying also for a new accounting so far as may be necessary for the purpose.²

598. Where the objection to an account stated is merely that it contains specific errors, this does not avoid the whole accounting. The accounting stands good until error is shown, and then it is modified only in the specific instances of error which are proved.³ This is called surcharging, or falsifying an account. Surcharging is claiming some new item of credit which the account does not show. Falsifying is striking out some debit item against the party with which, he asserts, he ought not to be charged.

¹ [Craig v. McKinney, 72 Ill. 305; Weed v. Smull, 7 Paige, 573; Sumner v. Thorpe, 2 Atk. 1.] lin, 52 Wis. 280. As to the evidence necessary to show a mistake, see Patton v. Cone, 1 Lea (Tenn.),

² [Barrow v. Rhineland, 1 14.]

Johns. Ch. 550; Hoyt v. McLaugh-

³ [Weed v. Smull, 7 Paige, 573.]

CHAPTER XXII.

CONTRIBUTION AND SUBROGATION.

Contribution.

599. WHERE two or more are sureties for a principal and one of them has paid the debt, or more than his share of it, he has a right to receive from his co-sureties their proportionate share of the amount so paid by him. His right to receive and their duty to pay such share are comprehended in the term "contribution."

This right of contribution does not depend upon any express promise or contract by one surety with another. It is an equitable right growing out of the relation of the parties. The law attaches the duty and implies the promise to contribute.¹

Whenever this co-suretyship exists, the right and obligation of contribution inhere in it, unless a surety has voluntarily made some express contract with a co-surety in derogation of his rights.²

600. Where contribution is claimed, the relation of co-suretyship is, then, a fact to be proved in every case. The original instrument given to the creditor, in which the supposed sureties join, as for example a bond or note, is not conclusive as to the real relation between themselves. Parol evidence is admissible to prove what their relations were to one another, and that these were different from what the law would imply from their signatures to the principal instrument.³

¹ [Dering v. Earl of Winchelsea, 1 Cox, 318; Campbell v. Messier, 4 Johns. Ch. 334, 338; Mills v. Hyde, 19 Vt. 59; Monson v. Drakeley, 40 Conn. 552; Agnew v. Bell, 4 Watts (Pa.), 31; Camp v. Bostwick, 20 Ohio St. 337. The mere fact that there is a remedy at law does not take

away the right to contribution in equity: Werhorn v. Kahn, 93 Ala. 201.]

² [Collins v. Prosser, 1 B. & C. 682; Craythorne v. Swinburne, 14 Ves. 160.]

³ [Nurre v. Chittenden, 56 Ind. 462; Paulin v. Kaighn, 27 N. J.

Thus, where all sign a note apparently as principals, it is competent for one to show in a suit against the other makers, that he was in fact their surety, and not a joint principal debtor with them.¹

601. So, also, when there are three successive indorsers on a note which the first indorser has paid, it is competent for him to show that they all indorsed the note under an agreement to do so as joint sureties for one another,² and therefore that he has a right of contribution from the second and third indorsers, although ordinarily, of course, being the first indorser, he could have no claim against any subsequent indorser.³ Such evidence does not vary or impugn the original contract between them on the one side and the creditor on the other. Their relation to him and their agreement with him are determined by their written contract; but what their agreement was with one another, when they signed the principal instrument, is a distinct fact apart from that instrument, to be proved by any competent evidence.

602. Inasmuch as the equitable right of contribution grows out of the fact that there are other sureties for the same principal, it is not necessary that they should have become such in the same instrument, nor even that one should have known that there were other sureties.⁴

L. 503; *Blake v. Cole*, 22 Pick. 97; *Longley v. Griggs*, 10 Pick. 121; *Barry v. Ransom*, 12 N. Y. 462; *Briggs v. Boyd*, 37 Vt. 534.]

Adams v. Flanagan, 36 Vt. 400; ³ *Weston v. Chamberlin*, 7 Cush. 404; [*Clapp v. Rice*, 13 Gray, 403; 221; *Apgar v. Hiler*, 24 N. J. L. 812. For an extreme case, see *McGee v. Prouty*, 9 Met. 547. See, further, *Bulkeley v. House*, 62 Conn. 459.]

⁴ [*Craythorne v. Swinburne*, 14 Ves. 160, 165; *Whiting v. Burke*, L. R. 10 Eq. 539; *Wells v. Miller*, 66 N. Y. 255; *Cobb v. Haynes*, 8 B. Mon. (Ky.) 137; *Monson v. Drakeley*, 40 Conn. 552; *Stevens v. Tucker*, 87 Ind. 109. But where sureties are bound by different instruments for distinct portions of the debt due from the principal, there is no right of contribution among them: *Coope v. Twynam*, Turn. & R. 426. But see *Armitage v. Pulver*, 37 N. Y. 494.]

¹ *Mansfield v. Edwards*, 136 Mass. 15.

² [The mere fact that they are successive indorsers, even for accommodation, does not make them liable, *inter se*, for contribution: *McCarty v. Roots*, 21 How. 432; *McCune v. Belt*, 45 Mo. 174. As to who are co-sureties, see further, *Harris v. Warner*, 13 Wend. 400; *Warner v. Price*, 3 Wend. 397;

603. The right of a surety is to indemnity and nothing more. Therefore, if he compounds the debt with the creditor and extinguishes it by paying less than the whole, he can recover from his principal only the amount so paid.¹ And this, too, although he takes an assignment of the claim to himself, or to a trustee for himself.²

So, also, he can recover from his co-sureties only their due proportion of the sum actually paid by him in discharge of the debt.³

604. The great advantage of relief in equity over that at law in the matter of contribution is this: At law, where there are several sureties, say four, and one has been obliged to pay the debt, he can recover of each of the others only one fourth, although one or two of the other sureties may be insolvent.⁴ The rule is different in equity. In equity he can recover of the solvent sureties full reimbursement without regard to the insolvent sureties. In the case supposed of four sureties, if two were insolvent he could recover from the fourth one half of the amount paid by him.⁵ So, also, if some of the sureties are out of the State he can recover of the solvent sureties within the State.⁶

605. PARTNERS. — The same rule of contribution applies

¹ [He can recover, even at law, only the amount actually paid by him: *Bonney v. Seely*, 2 Wend. 481; *Coggeshall v. Ruggles*, 62 Ill. 401; *Butler v. Bntler's Admr.* 8 W. Va. 674; *Succession of Dinkgrave*, 31 La. Ann. 703.]

² [*Reed v. Norris*, 2 Myl. & Cr. 361; *Wynn v. Brooke*, 5 Rawle, 106. *Contra*, *Blow v. Maynard*, 2 Leigh, 29, which held that a surety may, like a stranger, buy in a claim and hold the principal for the full amount.]

³ *Reed v. Norris*, 2 Myl. & Cr. 361; *Craythorne v. Swinburne*, 14 Ves. 160, 164; [*Tarr v. Ravenscroft*, 12 Gratt. (Va.) 642; *Sinclair v. Redington*, 56 N. H. 146; *Thompson v. Meisser*, 108 Ill. 359.]

⁴ [*Browne v. Lee*, 6 B. & C. 689, 698; *Cowell v. Edwards*, 2 B. & P. 268; *Parker v. Ellis*, 2 Sandf. 223; *Acers v. Curtis*, 68 Tex. 423. *Contra*, *Mills v. Hyde*, 19 Vt. 59.]

⁵ [*Peter v. Rich*, 1 Ch. Rep. 34; *Henderson v. McDuffee*, 5 N. H. 38; *Dodd v. Winn*, 27 Mo. 501; *Young v. Lyons*, 8 Gill (Md.), 162; *Klein v. Mather*, 7 Ill. 317; *Breckenridge v. Taylor*, 5 Dana (Ky.), 110; *Hodgson v. Baldwin*, 65 Ill. 532.]

⁶ *Cary v. Homes*, 16 Gray, 127; [*McKenna v. George*, 2 Richardson Eq. (S. C.) 15; *Boardman v. Paige*, 11 N. H. 431; *Liddell v. Wiswell*, 59 Vt. 365.]

to a partnership. If one partner has paid a partnership debt and some of the partners are insolvent, he can recover in equity of the solvent partners full proportionate reimbursement.¹ Also, if some of the partners are out of the State so that they cannot be reached by process, upon a bill against those within the State equity will require them to pay full contribution without reference to those who are *ex re*.²

606. The right of a surety to come into equity to recover contribution from his co-sureties is well settled.³ In Massachusetts, however, it may be doubtful whether such a right exists where there is only one co-surety from whom contribution is sought. The Public Statutes⁴ provide for suits for contribution . . . "where there is more than one person liable at the same time for such contribution." If there is "only one person liable," the inference would be that the remedy against him must be sought at law. Perhaps this is now altered by the statutory provision giving the fullest equity jurisdiction to the Supreme Court.⁵

Subrogation.

607. Where one has been obliged to pay the debt of another, either as surety or because his own property is subject to some prior lien for the debt, he is in equity entitled to succeed to all securities held by the creditor for the payment of his debt; and this constitutes the right of subrogation.⁶ This definition, it will be perceived, contemplates

¹ *Whitcomb v. Converse*, 119 Mass. 38; [*Kelly v. Kauffman*, 18 Pa. St. 351; *McGunn v. Hanlin*, 29 Mich. 476; *Farnum v. Patch*, 60 N. H. 294. This rule applies also to a stockholder in a corporation who has been sued by a creditor of the corporation; he has a right to contribution from his fellow-stockholders; *Erickson v. Nesmith*, 46 N. H. 371; *Umsted v. Buskirk*, 17 Ohio St. 113. See, also, *Weed v. Calkins*, 24 Hun, 582; *Moore v. Shurtleff*, 128 Ill. 370.]

² *Whitman v. Porter*, 107 Mass. 522.

³ [It is immaterial that the law courts have assumed jurisdiction; the equity jurisdiction is not ousted: *Conover v. Hill*, 76 Ill. 342; *Walker v. Cheever*, 35 N. H. 339; *Couch v. Terry*, 12 Ala. 225; *Story's Eq. §§ 492, 496.*]

⁴ Ch. 151, § 2, clause 5.

⁵ [Act of 1877.]

⁶ [*Belcher v. Hartford Bank*, 15 Conn. 381; *Johnson v. Barrett*, 117 Ind. 551; *Keokuk v. Love*, 31 Iowa, 119; *Tuck v. Calvert*, 33 Md. 209; *Fawcetts v. Kimmey*, 33 Ala. 261; *Lewis v. Palmer*, 28 N. Y. 271.]

two distinct classes of cases: (1) Where one has paid the debt of another as his surety. (2) Where one has been obliged to pay the debt of another, not because of any personal obligation to do so as surety, but in order to relieve his own property which is subject to some prior incumbrance for the security of the debt. I shall consider each in its order.

608. SUBROGATION AS SURETY. — A surety who has paid the debt of his principal is entitled to all securities held by the creditor for the same debt.¹ The rule was thus forcibly stated by Lord Chancellor Brougham: ² “The rule here is undoubted, and it is one founded on the plainest principles of natural reason and justice, that the surety paying off a debt shall stand in the place of the creditor, and have all the rights which he has for the purpose of obtaining his reimbursement. It is hardly possible to put this right of substitution too high; and the right results more from equity than from contract or *quasi* contract, unless in so far as the known equity may be supposed to be imported into any transaction, and so to raise a contract by implication. . . . ‘A surety,’ to use the language of Sir S. Romilly, ‘will be entitled to every remedy which the creditor has against the principal debtor, to enforce every security and all means of payment; to stand in the place of the creditor not only through the medium of contract, but even by means of securities entered into without the knowledge of the surety; having a right to have those securities transferred to him, though there was no stipulation for that, and to avail himself of all those securities against the debtor.’ ”

609. This right of subrogation does not invariably extend to the original claim, as a note for instance, but only to securities held for the payment of that claim. Formerly it was

¹ [Brandon v. Brandon, 3 De G. & J. 524; Hayes v. Ward, 4 Johns. Ch. 123; Berthold v. Berthold, 46 Mo. 557; McCormick v. Irwin, 35 Pa. St. 111; Jacques v. Fackney, 64 Ill. 87; Norton v. Soule, 2 Greenleaf, 341. The right of subrogation is created by law: it does not

depend upon any contract between the parties. See Matthews v. Fidelity, &c. Co. 52 Fed. Rep. 687; Mathews v. Aikin, 1 N. Y. 595; Miller v. Stout, 5 Del. Ch. 259.]

² In Hodgson v. Shaw, 3 Myl. & K. 183, 190.

held in England that a surety upon payment of the debt did not become the equitable assignee of the debt, *i. e.*, of the note or other obligation. It was considered that the obligation was absolutely discharged and put an end to by the payment of the surety, and therefore that he succeeded only to such other securities as the creditor held.¹

This also is the present rule in Massachusetts. On the payment of the debt by the surety it is deemed to be extinguished, and his subrogation extends only to such other securities as the creditor may have held.² But if a guarantor or surety makes a payment in whole or in part upon an express understanding with the payee that it shall not discharge the note, but that the payee shall hold it as security, the note is not thereby extinguished either in whole or in part, but is kept alive; and upon payment of the whole amount the guarantor or surety may bring suit thereon in his own name.³ No uniformity exists in this country, the rule being different in different States.⁴

610. The right of subrogation extends, the world over, to all securities held by the creditor, although the surety was ignorant of them.⁵ It also extends to all securities given to the creditor subsequently to the contract of suretyship.⁶

¹ The former English rule has been modified by statute. See 19 & 20 Vic. ch. 97, § 5.

[*Copis v. Middleton*, Turn. & R. 224; *Hodgson v. Shaw*, 3 Myl. & K. 190; *Forbes v. Jackson*, L. R. 19 Ch. D. 615.]

² *Adams v. Drake*, 11 Cush. 504; *Brackett v. Winslow*, 17 Mass. 153. These were cases of joint debtors, one paying the execution.

³ *Granite National Bank v. Fitch*, 145 Mass. 567.

⁴ For the law of the various States upon this point, see *Sheldon's Subrogation*, §§ 136-138. [In most of the States it is held that payment of the debt, thereby discharging the security, at law, does not extinguish the surety's right to subrogation in

equity: *Watts v. Kinney*, 3 Leigh, 272, 293; *Townsend v. Whitney*, 75 N. Y. 425; *Cottrell's Appeal*, 23 Pa. St. 294; *Lumpkin v. Mills*, 4 Ga. 343; *Friberg v. Donovan*, 23 Ill. App. 58; *Merriken v. Godwin*, 2 Del. Ch. 236; *Katz v. Moessinger*, 110 Ill. 372; *Hill v. King*, 48 Ohio St. 75. *Contra*: *Fitch v. Hammer*, 17 Colo. 591; *Frevort v. Henry*, 14 Nev. 191.]

⁵ *Lake v. Brutton*, 8 De G., M. & G. 441; [*Cottrell's Appeal*, 23 Pa. St. 294; *Commercial Bank v. Western Reserve Bank*, 11 Ohio, 444; *Lewis v. Palmer*, 28 N. Y. 271; *Pratt v. Thornton*, 28 Me. 355; *Hevener v. Berry*, 17 W. Va. 474.]

⁶ *Baker v. Briggs*, 8 Pick. 122, 129. But see *Newton v. Chorlton*,

611. A surety paying a debt is subrogated to all rights of priority which the creditor had for the payment of his debt. Some debts are made by law preferred debts, and some creditors have priority of payment over all other creditors, as for instance the United States government. A surety paying such a debt has been held to succeed to the priority of the principal creditor.¹ In *Hunter v. The United States*² it was said that "the same right of priority which belongs to the government attaches to the claim of an individual who, as surety, has paid money to the government." An example is found in the case of a surety on a custom-house bond.

The same rule holds in England, where a surety, on paying the amount of a bond to the crown, was subrogated to the right of priority of the crown, the principal debtor having become bankrupt.³

612. So, also, the surety is subrogated to any lien which the creditor had for the payment of his debt.⁴ Thus it has been held that where a corporation, by its charter, has a lien on the shares of its stockholders for any debt due to it from

10 Hare, 646 ; [Smith v. McLeod, 3 Ired. Eq. 390; Lochenmeyer v. Fogarty, 112 Ill. 572; Pearl St. Cong. Society v. Imlay, 23 Conn. 10; Shattuck v. Cox, 128 Ind. 293; May v. White, 40 Iowa, 246.]

¹ [Lidderdale v. Robinson, 2 Brock. 159 ; s. c. 12 Wheat. 594; Schoolfield v. Rudd, 9 B. Mon. 291; Boltz Estate, 133 Pa. St. 77; Orem v. Wrightson, 51 Md. 34; Enders v. Brune, 4 Randolph (Va.), 438; Richeson v. Crawford, 94 Ill. 165.]

² 5 Peters, 173, 182.

³ Manisty v. Churchill, L. R. 39 Ch. D. 174.

⁴ [Billings v. Sprague, 49 Ill. 509; Pierce v. Higgins, 101 Ind. 178. So, also, where the vendor of real or personal estate has a lien upon it for the purchase-money, a surety for the purchase-money will be sub-

rogated to this lien as against the vendee or purchasers with notice : Ghiselin v. Fergusson, 4 H. & J. 522 ; Kleiser v. Scott, 6 Dana (Ky.), 137; James v. Burbridge, 33 W. Va. 272; Smith v. Schneider, 23 Mo. 447. But in many States the taking of security waives the vendor's lien. See *supra*, p. 145. So, if the surety on a vendor's bond to give a good title is compelled to repay the purchase-money to the vendee, he is subrogated to the vendee's lien upon the land, and to his right to a suit for specific performance : Freeman v. Mebane, 2 Jones Eq. 44. See, further, on the general subject, Bushong v. Taylor, 82 Mo. 660; Blake v. Traders' Bank, 145 Mass. 13; Bunting v. Ricks, 2 Dev. & B. Eq. (N. C.) 130; Philbrick v. Shaw, 61 N. H. 356; Person v. Perry, 70 N. C. 697; Hall v. Hoxsey, 84 Ill. 616.]

the latter, the surety of a stockholder is subrogated to the same lien if he pays the debt.¹

So, also, where a judgment creditor had a lien on real estate of the debtor, and a surety paid the debt, the surety was subrogated to this lien as against an assignee in bankruptcy.²

613. This right of subrogation does not exist, however, in the case of a surety on a bond or recognizance in a criminal case where, on account of the default of the principal (in not appearing), the surety has been obliged to pay the bond.³

614. To recapitulate, a surety paying the debt is entitled to be subrogated as follows:—

(a) In England and in some of the States (but not in Massachusetts), to the original claim of the creditor, without an express agreement to that effect, but in Massachusetts only if there is an express agreement not to extinguish the debt.

(b) In every State, to all securities held by the creditor for the debt.

(c) To any priority to which the creditor was entitled.

(d) To any special lien to which the creditor was entitled.

Finally, the right of subrogation does not exist in any criminal proceeding.

615. It follows necessarily, from what has been said, that a creditor can do nothing to defeat or impair the right of a surety to be subrogated to the securities once held by the creditor. It is therefore well settled that if a creditor, knowing that the party is a surety, surrenders⁴ or negligently

¹ *Klopp v. Lebanon Bank*, 46 Pa. St. 88; [*Young v. Vough*, 23 N. J. Eq. 325.]

² *In re Lawrence*, 5 Fed. Rep. 349.

³ *United States v. Ryder*, 110 U. S. 729; *Cripps v. Hartnoll*, 4 B. & S. 414. [These decisions rest upon the ground that there is no implied contract of indemnity between the parties, and also upon the ground that to permit subrogation in such

cases would be contrary to public policy: *United States v. Ryder*, 110 U. S. 729, 737.]

⁴ [*Holland v. Johnson*, 51 Ind. 346; *Baker v. Briggs*, 8 Pick. 122; *N. H. Savings Bank v. Colcord*, 15 N. H. 119; *Cummings v. Little*, 45 Me. 183; *Austin v. Belknap*, 54 Vt. 495; *Stewart v. Davis*, 18 Ind. 74; *Kirkpatrick v. Howk*, 80 Ill. 122; *Bixby v. Barklie*, 26 Hun, 275.]

loses any security, he thereby discharges the surety to the extent of the value of such security.¹

616. He is also bound to use due and reasonable diligence in reference to such securities; and therefore if, without any effort to collect them, he allows them to become outlawed in his hands, or to be lost by his negligence in any other way, he is responsible for their value.² Thus if a creditor loses his security by negligence in failing to record it (as in the case of a mortgage), he thereby discharges the surety *pro tanto*.³

Thus, also, where the debtor assigned to the creditor the title to some ships as security, and the creditor negligently failed to record the assignment in the proper registry, and the debtor was thereby enabled to sell the ships to an innocent purchaser, the creditor was held chargeable with negligence, and was made accountable to the surety for the value of the security thus lost.⁴

617. Nor can a creditor, in collecting securities, accept less than their face value without proof that the sum received was all they were worth, or all that could be collected upon them. If he improperly accepts less, he is accountable to the surety for the difference between their face value and the amount received.⁵ Thus, where a creditor had received

¹ *Guild v. Butler*, 127 Mass. 386; [*Strange v. Fooks*, 4 Giffard, 408; *Rogers v. School Trustees*, 46 Ill. 428; *Hurd v. Spencer*, 40 Vt. 581; *Middleton v. First National Bank*, 40 Iowa, 29.]

² *Douglass v. Reynolds*, 7 Peters, 113, 128; [*Kemmerer v. Wilson*, 31 Pa. St. 110; *Jennison v. Parker*, 7 Mich. 355; *Slevin v. Morrow*, 4 Ind. 425; *Word v. Morgan*, 5 Sneed (Tenn.), 79; *City Bank v. Young*, 43 N. H. 457.]

³ [*Burr v. Boyer*, 2 Neb. 265; *Wulff v. Jay*, L. R. 7 Q. B. 756; *Galbraith v. Townsend*, 1 Tex. Civ. App. 447. *Contra*: *Hampton v. Levy*, 1 McCord Ch. 107; *Philbrooks v. McEwen*, 29 Ind. 347.]

⁴ *Capel v. Butler*, 2 Sim. & St. 457.

⁵ [*Phares v. Barbour*, 49 Ill. 370. So, if a creditor releases a levy made upon property of the principal debtor, the surety is discharged to the extent of the loss thus incurred: *Springer v. Toothaker*, 43 Me. 381; *Dixon v. Ewing*, 3 Ohio, 281; *Bank v. Fordyce*, 9 Pa. St. 275; *Mayhew v. Crickett*, 2 Swanston, 185; *McKenzie v. Wiley*, 27 W. Va. 658; *Rice v. Morton*, 19 Mo. 263; *Mulford v. Estudillo*, 23 Cal. 94. The effect is the same where the creditor releases an attachment: *City of Maquoketa v. Willey*, 35 Iowa, 323. *Contra*: *Concord Bank v. Rogers*, 16 N. H. 9; *Bank of Montpelier v. Dixon*, 4 Vt. 587; *Bel-*

as security certain notes, and had settled the debt by accepting less than their full amount, he was charged with the difference, in the absence of proof that it was not practicable to collect the whole amount. It is not sufficient for the creditor to prove simply that he acted in good faith: he must show, as a matter of fact, that the security was worth no more than the amount accepted by him.¹

Where the holder of a bill of exchange proved the bill in bankruptcy proceedings against the acceptors in England and received his dividend, it was held that this, amounting to a voluntary discharge of the acceptors, also discharged the drawers (sureties in fact), because the voluntary discharge of the acceptors deprived the drawers of the right on payment of the bill to be subrogated to the claim of the holder as against the acceptors.²

618. If the surety has paid to the creditor the debt of his principal, not knowing that the creditor has improperly parted with any security, he may thereafter recover its value of the creditor.³

619. This right of subrogation never goes to the extent of requiring the creditor to apply his securities to the payment of the debt before calling upon the surety. The surety has no right to require the creditor to exhaust his securities before proceeding against him. The surety is directly and immediately liable, and he is bound to pay the debt as soon as it becomes due, whether the creditor holds security or not.⁴

lows v. Lovell, 5 Pick. 307. See, also, *Sheldon on Subrogation*, § 122.]

¹ *Guild v. Butler*, 127 Mass. 386; *American Bank v. Baker*, 4 Met. 164.

² *Phelps v. Borland*, 103 N. Y. 406.

³ *Chester v. Kingston Bank*, 16 N. Y. 336.

⁴ *Allen v. Woodard*, 125 Mass. 400; [*Folliott v. Ogden*, 1 H. Black. 123; *Freaner v. Yingling*, 37 Md. 491; *Brick v. Banking Co.* 37 N. J. L. 307; *English v. Seibert*, 49 Mo. App. 563.

It may be stated as a general rule that a creditor is never bound to exercise active diligence: *Fulton v. Matthews*, 15 Johns. 433; *Hunt v. United States*, 1 Gallison, 32; *Martin v. Bank*, 6 Har. & J. (Md.) 235; *Hunt v. Bridgham*, 2 Pick. 581; *Adams Bank v. Anthony*, 18 Pick. 238; *Campbell v. Sherman*, 151 Pa. St. 70; *Kesler v. Linker*, 82 N. C. 456.

So where the principal dies or becomes insolvent, and the creditor by delay loses his right to recover from the estate, the surety is not thereby

Formerly it was held (1) that the surety might go into equity to compel the principal debtor to pay the debt; (2) that the surety, on furnishing adequate security, might likewise compel the creditor to sue the principal debtor.¹

620. The liability of the creditor to the surety, for the value of securities surrendered or negligently lost, exists only where the creditor knew or had notice that the latter was in fact a surety merely, and not a principal debtor.

If, for instance, the creditor's claim consists of a promissory note, which the alleged surety signed as a principal, so as to make him in appearance a principal joint debtor, it is incumbent on him to show that he was in fact merely a surety to the principal debtor, and that the creditor knew this. "The fact that one debtor is a surety for the other is no part of the contract with the creditor, but is a collateral fact

released: *People v. White*, 11 Ill. 341; *Fetrow v. Wiseman*, 40 Ind. 148; *Sibley v. McAllaster*, 8 N. H. 389; *Mitchell v. Williamson*, 6 Md. 210; *Shaffstall v. McDaniel*, 152 Pa. St. 598; *Darby v. Berney Bank*, 97 Ala. 643; *Schott v. Youree*, 142 Ill. 233.]

¹ 2 Story's Eq. § 730; *Hayes v. Ward*, 4 Johns. Ch. 123. One modern case in England is to the same effect: *Wooldridge v. Norris*, L. R. 6 Eq. C. 410. [The weight of authority is now to the effect that in a court of equity the surety, by agreeing to indemnify the creditor for any loss that he may sustain, can compel the creditor to sue the principal debtor: *Irick v. Black*, 17 N. J. Eq. 189; *Whitridge v. Durkee*, 2 Md. Ch. 442; *Huey v. Pinney*, 5 Minn. 310; *Bishop v. Day*, 13 Vt. 81. In Pennsylvania the right of a surety to compel the creditor to sue the principal debtor is enforceable in a court of law. *Cope v. Smith*, 8 S. & R. 110.

But a mere request to the creditor

by the surety that the former should sue the principal debtor is not sufficient; and if the creditor refuses such request, and the principal debtor subsequently becomes insolvent, and the surety thus loses the opportunity to recover from him, the surety is not thereby discharged: *Hickok v. Farmer's Bank*, 35 Vt. 476; *Inkster v. Bank*, 30 Mich. 143; *Hogshead v. Williams*, 55 Ind. 145; *Harris v. Newell*, 42 Wis. 687; *Dennis v. Ryder*, 2 McLean, 451; *Leavitt v. Savage*, 16 Me. 72. *Contra*: *Paine v. Packard*, 13 Johns. 174; *King v. Baldwin*, 17 Johns. 384 (reversing a decision by Chancellor Kent in 2 Johns. Ch. 559); *Thompson v. Watson*, 10 Yerger, 362; *Martin v. Skehan*, 2 Col. 614. In many of the States (as, for example, Alabama, Arkansas, Indiana, Illinois, Iowa, Georgia, Missouri, Ohio, West Virginia) statutes have been passed releasing the surety in case the creditor refuses, after written request by the surety, to sue the principal debtor.]

showing the relations between the debtors themselves; and if it does not appear on the face of the instrument, this fact and notice of it to the creditor may be proved by extrinsic evidence."¹

621. But whenever a creditor knows that one is merely a surety, he holds all securities for the debt practically as a trust for the ultimate benefit of the surety, and he can neither surrender them nor negligently impair their value without being accountable to the surety for their value.

The fact that one is surety for another may, for the purpose of charging the creditor with securities, be proved as against the creditor by parol evidence; and the instrument creating the original liability to the creditor is not conclusive upon this point.²

If they sign as joint promissors he may treat them as such in enforcing their liability under the written instrument, and the written instrument is conclusive upon that point. But in dealing with any securities he must be governed by the fact that one is a surety, and do nothing to prejudice the right of the surety to the collateral security.³

Nor is it essential that the creditor should have had this notice at the time when the contract was made. Whenever knowledge of the fact is brought home to him, although subsequently to the giving of the obligation, he must there-

¹ *Guild v. Butler*, 127 Mass. 386, and cases cited; [*Wells v. Girling*, 8 Taunton, 737; *Harris v. Brooks*, 21 Pick. 195; *Grafton Bank v. Kent*, 4 N. H. 221; *Bank v. Smith*, 30 Vt. 148; *Flynn v. Mudd*, 27 Ill. 323; *Riley v. Gregg*, 16 Wis. 666; *Mechanics' Bank v. Wright*, 53 Mo. 153; *Hubbard v. Gurney*, 64 N. Y. 457. The proposition in the text applies although the instrument be under seal: *Dozier v. Lea*, 7 Humph. (Tenn.) 520; *Dickerson v. Commissioners*, 6 Ind. 128. That this is so even at law, see *Rogers v. School Trustees*, 46 Ill. 428; *Creigh v. Hedrick*, 5 W. Va. 140; *Scott v. Bailey*,

23 Mo. 140. *Contra*, *Spriggs v. Bank*, 10 Peters, 256; *Deberry v. Adams*, 9 Yerg. 52.]

² [*Carpenter v. King*, 9 Met. 511; *Grow v. Garlock*, 97 N. Y. 81, and cases *supra*, p. 321. So, where the principal and the creditor enter into a contract to extend the time of payment without the consent of the surety, the latter is discharged, and parol evidence is admissible to show that one of the apparent principals was a surety to the knowledge of the creditor: *Lime Rock Bank v. Mallett*, 34 Me. 547.]

³ [*Carpenter v. King*, 9 Met. 511; *Otis v. Von Storch*, 15 R. I. 41.]

after do nothing to impair the equitable right of the surety.¹

622. Every joint surety is entitled also to share in all securities given by the debtor to any other joint surety.²

If security has been given by the debtor to one surety secretly, without the knowledge of the others, they are all entitled to share equally in its benefits. Equality in this instance is equity. The law will allow of no preference to be given by the debtor to one surety over another; and such preference can exist, if at all, only by virtue of an express contract understandingly made by the co-sureties with one another to this effect.

As is said in an English case, "Each surety must bring into hotchpot every benefit which he has received, . . . in order that it may be ascertained what is the ultimate burden which the co-sureties have to bear, so that the ultimate burden may be distributed between them equally or proportionably, as the case may require."³

623. On the other hand, a creditor is entitled to the benefit of all securities given by the principal debtor to his surety to secure the latter upon his liability for the debt; and equity will require all such securities to be applied in behalf of the creditor to the payment of the debt.⁴

This was distinctly settled in a very early case,⁵ where the court said: "A bond creditor shall in this court have the benefit of all counter bonds or collateral security given by

¹ *Guild v. Butler*, 127 Mass. 386, *supra*; [*Pooley v. Harradine*, 7 El. & Bl. 431; *Bank of Missouri v. Matson*, 26 Mo. 243; *Lauman v. Nichols*, 15 Iowa, 161; *Wheat v. Kendall*, 6 N. H. 504.]

² [*Berridge v. Berridge*, L. R. 44 Ch. D. 168; *Silvey v. Dowell*, 53 Ill. 260; *Brown v. Ray*, 18 N. H. 102; *Seibert v. Thompson*, 8 Kans. 65; *Whiteman v. Harriman*, 85 Ind. 49; *Scribner v. Adams*, 73 Me. 541; *Boughner v. Hall*, 24 W. Va. 249.]

³ *Steel v. Dixon*, L. R. 17 Ch. D.

825. See, also, *Miller v. Sawyer*, 30 Vt. 412; *Lane v. Stacy*, 8 Allen, 41.

⁴ [*Wright v. Morley*, 11 Ves. 12, 22; *Kramer & Rahm's Appeal*, 37 Pa. St. 71; *Curtis v. Tyler*, 9 Paige, 432; *New London Bank v. Lee*, 11 Conn. 112; *Owens v. Miller*, 29 Md. 144; *Cooper v. Middleton*, 94 N. C. 86; *Holt v. Penacook Bank*, 62 N. H. 551; *Penderry v. Allen*, 50 Ohio St. 121.]

⁵ *Maure v. Harrison*, 1 Eq. Ca. Abr. 93, quoted from in *Hampton v. Phipps*, 108 U. S. 260, 263.

the principal to the surety; as, if A owes B money, and he and C are bound for it, and A gives C a mortgage or bond to indemnify him, B shall have the benefit of it to recover his debt."

The creditor has an equitable lien on all securities given to the surety by the debtor, which equity will enforce in his favor against all persons taking the security with notice of his lien. The surety has no right to surrender such security unless the debt has been paid, nor to prejudice in any respect the equitable right of the creditor therein.

624. It has been held, and may be considered well settled, —

(1) That where the principal debtor gives to his surety a mortgage conditioned to pay the debt and to save the surety harmless, a trust and equitable lien are thereby created in favor of the creditor as well as the surety, and equity will compel the application of the security to the payment of the debt.¹

(2) That recording such a mortgage is notice to all the world of the equitable trust and lien, and whoever thereafter purchases the estate or the mortgage takes it subject to this equity of the creditor.²

(3) It has also been held that, where the grantee of a mortgaged estate agrees to assume and pay the mortgage debt, the mortgagee is in equity substituted to the right of the grantor (the mortgagor) under this promise, and if the mortgaged estate is insufficient to pay the debt he may recover the deficiency of the grantee.³

In *Locke v. Homer*⁴ it was held that acceptance by a

¹ [Paris v. Hulett, 26 Vt. 308.]

² Eastman v. Foster, 8 Met. 19; Hayden v. Smith, 12 Met. 511.

³ Davis v. Hulett, 58 Vt. 90; [Calvo v. Davies, 8 Hun, 222; Blyer v. Monholland, 2 Sandf. Ch. 478; Thompson v. Bertram, 14 Iowa, 476; Rogers v. Herron, 92 Ill. 583; Wager v. Link, 134 N. Y. 122; Union Mut. Ins. Co. v. Hanford, 143 U. S. 187; Palmeto v. Carey, 63 Wis. 426; Crowell v. Currier, 27 N.

J. Eq. 152, 154; Fitzgerald v. Barker, 70 Mo. 685; Sheldon on Subrogation, § 85. The relation between the grantor and grantee is that of principal and surety: McLean v. Towle, 3 Sandf. Ch. 117; James v. Day, 37 Iowa, 164; Walker v. King, 45 Vt. 525; Stillman v. Stillman, 21 N. J. Eq. 126; Sheldon on Subrogation, § 24.]

⁴ 131 Mass. 93.

grantee of a deed containing such a clause constituted a contract with and a promise by him which the grantor might enforce.

(4) It is also now well settled, even in bankruptcy, that if a mortgage, pledge, or lien has been given by a principal debtor to secure his surety, and both become insolvent, the holders of the notes or other debts for which the surety is bound (*i. e.* the creditors) have an equity to require the property to be applied to the discharge of their debts specifically in preference to other creditors.¹

(5) But a creditor is not entitled to be subrogated to a mortgage or other security given by one of two sureties to the other to indemnify him against being compelled to pay more than a certain proportion of the debt. Subrogation applies only to securities furnished by the principal debtor.²

So, if a stranger gives security to the surety, the creditor has no claim thereon.³

(6) No voluntary payment of the debt of another will entitle the party paying to subrogation. It must be a payment which he was bound to make, either as surety of the principal, or to relieve his own property from some prior lien.⁴

¹ *Ex parte* Waring, 19 Ves. 345; *Ex parte* Morris, 2 Lowell's Dec. 424 and cases cited; [*In re* Fickett, 72 Me. 266; *Kelley v. Herrick*, 131 Mass. 373; *Thompson v. Taylor*, 12 R. I. 109.]

² *Hampton v. Phipps*, 108 U. S. 260.

³ *Hampton v. Phipps*, *supra*; [*Taylor v. Farmer's Bank*, 87 Ky. 398.]

⁴ *Ætna Life Insurance Co. v. Middleport*, 124 U. S. 534. It was said by Chancellor Walworth in *Sanford v. McLean*, 3 Paige, 117, 122, that he must "stand in the situation of a surety, or be compelled to pay to protect his own rights." [*Swan v. Patterson*, 7 Md. 164; *Banta v. Garmo*, 1 Sandf. Ch. 383; *Dawson v. Lee*, 83 Ky. 49; *Fay v. Fay*, 43 N. J. Eq. 438; *Arnold v. Green*, 116 N. Y. 566; *Wadsworth v. Blake*, 43 Minn. 509; *Bunn v. Lindsay*, 95 Mo. 250; *Moody v. Moody*, 68 Me. 155. See *Skinner v. Tirrell*, 159 Mass. 474. As to who is a volunteer, see *Emmet v. Thompson*, 49 Minn. 386; *Hull v. Hull*, 35 W. Va. 155; *Hough v. Ætna Co.* 57 Ill. 318; *Pease v. Egan*, 131 N. Y. 262; *Perry v. Adams*, 98 N. C. 167; *Backer v. Pyne*, 130 Ind. 288; *Hoover v. Epler*, 52 Pa. St. 522; *Gooch v. Botts*, 110 Mo. 419. For a discussion of the general subject of subrogation of strangers, see *Sheldon on Subrogation*, ch. viii.]

Subrogation of Owner.

625. The second form of subrogation exists where one having some title to or interest in a piece of property, real or personal, in order to preserve that title or interest has been obliged to discharge a preëxisting lien or incumbrance on the property. In all of these cases the person thus paying is entitled in equity to succeed to and have the benefit of such lien or incumbrance. He is subrogated to all the rights of the original creditor in this respect, and stands in his shoes.

626. SUBSEQUENT MORTGAGEE. — The first and one of the most important instances is that of a subsequent mortgagee who pays the debt due to a prior mortgagee of the same estate.

The second mortgagee of an estate, in order to make his security available, must in some way obtain control of the first mortgage; for if the first mortgagee should foreclose his mortgage, the second mortgage would become worthless. Unless, then, the debtor himself pays the debt, the second mortgagee must pay it if he would reap any benefit from his own mortgage; and if he pays it, equity never treats, nor permits the transaction to be treated, as a satisfaction or discharge of the first mortgage, but simply as an assignment of it to the second mortgagee. Whatever form the papers may take, although the first mortgagee may in terms write a satisfaction and discharge of his mortgage, in equity it is not discharged, but it is simply assigned to the second mortgagee.¹

The justice of this is apparent. If the transaction were construed as a discharge of the first mortgage, then the debtor might redeem his estate from the second mortgage simply by paying the amount due under the second mortgage, although the second mortgagee had been obliged to pay the first mortgage. Whenever, then, a subsequent mort-

¹ [Downer v. Fox, 20 Vt. 388; v. Parmely, 14 Hun, 398. See, also, Darst v. Bates, 95 Ill. 493; McGuffey v. McClain, 130 Ind. 327; Yapple v. Graves, 85 Ind. 92; Denton v. Stephens, 36 Kans. 680; Johnson Cole, 30 N. J. Eq. 244.]

gagee has been obliged to pay a prior mortgage, he becomes in equity the assignee of that mortgage, and is subrogated to all the rights of the prior mortgagee.¹

627. The only possible exception to this rule is where the first mortgage has been in form discharged upon the public record, and a *bonâ fide* purchaser without notice buys the estate of the debtor, supposing that the first mortgage had in fact been paid. As against such *bonâ fide* purchaser the first mortgage probably could not be set up.²

628. It is also a well-settled rule in equity that, where a subsequent owner of the equity of redemption (if not the mortgagor) pays a prior mortgage, the payment shall never operate as an extinguishment of the first mortgage to the prejudice of any existing rights of the purchaser, but the transaction will be treated simply and purely as an assignment of the first mortgage.³

In one case, where there was a deed from grantor to grantee fraudulent as against the grantor's creditors, the grantee subsequently purchased a prior valid mortgage of the same estate, and took a quitclaim deed which read, "Said mortgage is hereby cancelled and discharged." It was held that this deed under the circumstances constituted an assignment and not a merger of the mortgage. Inasmuch as the grantee took no title to the equity of redemption under his deed, as against the creditors, there was no merger of the mortgage or of the equity in him.⁴

629. As between joint debtors or joint mortgagors, the general rule is that, if one pays the debt or incumbrance for the benefit of all, he has a right to hold the whole estate

¹ [Dings v. Parshall, 7 Hun, 522; 82; Evans v. Kimball, 1 Allen, 240; Davis v. Winn, 2 Allen, 111; Hamilton v. Dobbs, 19 N. J. Eq. 227; Crosby v. Taylor, 15 Gray, 64; Flachs v. Kelly, 30 Ill. 462; Bank of [Hinds v. Ballou, 44 N. H. 619; United States v. Peters, 13 Peters, 123; Weld v. Sabine, 20 N. H. 533.] Bryar's Appeal, 111 Pa. St. 81; Price v. Hobbs, 47 Md. 359; Ayers v. Adams, 82 Ind. 109; Knox v. Easton, 38 Ala. 345; Young v. Morgan, 89 Ill. 199; Barnes v. Mott, 64 N. Y. 397; Matzen v. Shaffer, 65 Cal. 81.]

² Davis v. Winn, 2 Allen, 111, 114.

³ Gibson v. Crehore, 3 Pick. 475, 482; Freeman v. M'Gaw, 15 Pick.

⁴ Crosby v. Taylor, 15 Gray, 64.

thus redeemed until his co-debtors shall have paid him their equitable proportion.¹ In other words, he is subrogated to the rights of the original mortgagee, and in equity holds the security for his indemnity.²

Thus, in *Pratt v. Law*,³ one of three joint mortgagors paid the whole debt, and requested the mortgagee not to discharge the mortgage, but to hold it for his benefit. It was held that a lien existed in equity upon the mortgaged property in favor of the mortgagor paying, for the amount of two thirds of the debt.

630. It is not necessary that there should be an actual assignment of the security by the creditor to a joint mortgagor thus paying the whole debt, in order to entitle him to subrogation in equity. He becomes in effect the assignee by the act of payment. Therefore, if no transfer of the mortgage has been made to him, he is nevertheless the equitable assignee of it.

In *Lamb v. Montague*⁴ the court held that a mortgagee, on receiving payment from one of the debtors, was not bound to transfer his title, nor to do anything more than release the interest of the debtor so paying. They held, also, that such a transfer was unnecessary, saying: "When such rights [of subrogation] exist, they are protected on those settled principles of equity by which one who assumes more than his share of the common burden is subrogated to the rights of the mortgagee to hold, without any assignment or act of transfer as *quasi* assignee, for the purpose of compelling contribution. He becomes in effect the assignee of the mortgage for the purpose of enabling him to compel a contribution."

631. The right of subrogation exists not only in the case of a prior mortgage, but where there is any other prior lien

¹ [Deitzler v. Mishler, 37 Pa. St. 82; Crafts v. Mott, 4 N. Y. 604; Wheatley v. Calhoun, 12 Leigh, 264.]

Goodall v. Wentworth, 20 Me. 322; ² Chase v. Woodbury, 6 Cush. 143, 146.

Hall v. Hall, 34 Ind. 314; Young v. Williams, 17 Conn. 393; Dobyns v. Rawley, 76 Va. 537; B. & O. R. R. Co. v. Walker, 45 Ohio St. 577; ³ 9 Cranch, 456. A similar decision was made in Saunders v. Frost, 5 Pick. 259.

⁴ 112 Mass. 352.

or incumbrance it exists in favor of one having a subsequent title to the same property.¹ Thus, A purchased land, but omitted to record the deed. A judgment creditor of the grantor levied his execution upon this land and took it in satisfaction of his debt. The grantor had given to the same creditor a mortgage on other land to secure the debt. It was held that A, the purchaser, was subrogated to all the rights of the creditor under the mortgage.²

632. Where one has obtained an estate in fraud of the creditors of the grantor, and his title has been defeated by them, he does not succeed by subrogation to the rights of such creditors.³

Subrogation of Insurers.

633. A third and entirely distinct instance in which the right of subrogation may exist is in the case of insurers against fire or marine risks.

Where an insurer has paid a loss he has an implied right to be subrogated to all claims of the insured against any third persons on account of such loss.⁴ This right of the insurer does not depend upon privity of contract, — it is an equity which inheres in the very transaction of insurance itself.⁵

634. This matter has arisen most frequently in suits against common carriers where, during the transportation of goods, a loss has occurred by fire or other casualty, for which the carrier was responsible. In such cases, as a general

¹ [Matteson v. Thomas, 41 Ill. 110; Silver Lake Bank v. North, 4 Johns. Ch. 370; Spaulding v. Harvey, 129 Ind. 106; Stevens v. King, 84 Me. 291; Clute v. Emmerich, 99 N. Y. 342; Hoke v. Jones, 33 W. Va. 501; Warren v. Warren, 30 Vt. 530.]

² Wall v. Mason, 102 Mass. 313. See, also, Brown v. Worcester Bank, 8 Met. 47.

³ Railroad Company v. Soutter, 13 Wall. 517. [See, also, Boyer v.

Bolender, 129 Pa. St. 324; Rowley v. Towsley, 53 Mich. 329.]

⁴ [Randal v. Cockran, 1 Ves. Sen. 98; Garrison v. Memphis Insurance Co. 19 How. 312; Clark v. Wilson, 103 Mass. 219; Monmouth Insurance Co. v. Hutchinson, &c. Co. 21 N. J. Eq. 107; Atlantic Insurance Co. v. Storrow, 5 Paige, 285; Pratt v. Radford, 52 Wis. 114; Chicago, &c. Co. v. Pullman Co. 139 U. S. 79.]

⁵ See Hall v. The Railroad Companies, 13 Wall. 367, and cases there cited in the note.

rule, the payment of the loss by the insurer works an equitable assignment to him of all the remedies which the insured had against the carrier for the recovery of damages.¹ In both of the cases just cited, the insurer was allowed to maintain an action against the carrier in the name of the shipper, the insured, after having paid to the latter the amount of his loss. Many other cases to the same effect are cited in the opinions in those cases.

635. The same rule applies whenever insured property has been destroyed or damaged by the wrongful act of another. The insurer paying the loss is subrogated to all rights of action of the owner against the wrong-doer.² Where, for example, a house was destroyed by fire through the negligence of a railroad company, it was held that the insurers upon payment of the loss were subrogated to the rights of the owner, and could maintain an action in his name against the railroad company for the value of the house, and that the owner could not legally release such action.³

Again, in case of loss or damage to a ship by a collision at sea, the insurer paying the loss is subrogated to the right of the ship not in fault against the ship in fault to recover damages for the collision.⁴

636. But where two ships owned by the same person came in collision and one was sunk, and the insurers paid the loss, it was held that they did not become entitled to make any claim against the insured as the owner of the ship in fault, for their right only existed through the owner of the ship insured, and not independently of him; that it was strictly

¹ *Mobile & Montgomery R. R. Co. v. Jurey*, 111 U. S. 584, 594; [*Connecticut Insurance Co. v. Erie Railway Co.* 73 N. Y. 399; *Kentucky Insurance Co. v. Western R. R. Co.* 8 Baxter, 268. But the action must be brought in the name of the insured: *Mason v. Sainsbury*, 3 Doug. 61; *Holcombe v. Richmond & Danville R. R.* 78 Geo. 776; *Rockingham Co. v. Boshier*, 39 Me. 253; *Peoria Insurance Co. v. Frost*, 37 Ill. 333. And of course the full

value may be recovered: *Mobile R. Co. v. Jurey*, 111 U. S. 584; *Gales v. Hailman*, 11 Pa. St. 515.]

² [*Mason v. Sainsbury*, 3 Doug. 61; *Clark v. Inhabitants of Blything*, 2 B. & C. 254.]

³ *Hart v. Western R. R. Co.* 13 Met. 99.

⁴ *North of England Insurance Association v. Armstrong*, L. R. 5 Q. B. 244. See, also, *Clark v. Wilson*, 103 Mass. 219, 227; [*Yates v. Whyte*, 4 Bing. N. C. 272.]

a derivative right, — a right to stand in the shoes of the insured, and consequently, inasmuch as he could not have sued himself, the insurers could not sue him.¹

637. This implied right of subrogation of an insurer may, however, be defeated by an express contract between the shipper and the carrier to the effect that in case of any loss the carrier shall be subrogated to all rights of the shipper against the insurer.

It has been held in several cases, (1) that such an express contract may lawfully be made between the shipper and the carrier, and (2) that its effect is to defeat the implied right of the insurer, upon payment of the loss, to be subrogated to the claim of the insured against the carrier.² Such express contracts are very commonly contained in bills of lading.

638. The effect of such a contract between the insured and the carrier upon the policy of insurance has been until recently an open question. It was asserted that such a contract was in derogation of the equitable right of the insurer to subrogation, and therefore that it avoided the policy. On the other hand it was said that this implied right of subrogation is merely a derivative right, — a right to be derived solely through the insured; that, in the absence of fraud, the insured is at liberty to make any lawful contract with a carrier for the conveyance of his goods; and that, if he can secure better terms by giving the carrier the benefit of any insurance that he may effect, he is at liberty so to do, and the insurer has no right to complain.³

¹ *Simpson v. Thomson*, L. R. 3 App. Cas. 279; [*Globe Insurance Co. v. Sherlock*, 25 Ohio St. 50.]

² *Mercantile Insurance Co. v. Callebs*, 20 N. Y. 173; *Rintoul v. New York Central, &c.* R. R. Co. 17 Fed. Rep. 905; s. c. 20 Fed. Rep. 313; *Phoenix Insurance Co. v. Erie, &c. Transportation Co.* 10 Biss. 18; [*Jackson Co. v. Boylston Insurance Co.* 139 Mass. 508; *Platt v. Richmond R. R. Co.* 108 N. Y. 358.]

³ [As to whether the doctrine of

subrogation extends so far as to subrogate a life insurance company to a right of action against one causing the death of the insured, — as a railroad for instance, — *quære*. To the effect that it does not, see *Macy on Insurance*, § 453; *Sheldon on Subrogation*, § 239, citing *Mobile Insurance Co. v. Brame*, 95 U. S. 754; *Anthony v. Slaid*, 11 Met. 290; *Connecticut Mutual Life Insurance Co. v. New York & New Haven Co.* 25 Conn. 265. These

639. And such is now the settled doctrine, namely, that where a shipper agrees with a carrier that in case of loss the latter may be subrogated to all rights of insurance which the shipper has, such agreement is valid, and, in the absence of any fraudulent concealment or representation, it does not avoid the policy of insurance.¹

decisions are upon the ground that there is no privity of contract between the insurer and the defendant, and that the injury inflicted by the defendant upon the insured is too remote and indirect a cause of the insurer's loss. The United States Supreme Court case and the Connecticut case are based also upon the additional ground that no action lies for causing instant death. For a different decision upon the last-named point, see *Sullivan v. Union Pacific R. R. Co.* 3 Dill. 334. See, further, for a discussion of the general subject, *Harding v. Townsend*, 43 Vt. 536; *Pittsburg, &c. R. Co. v. Thompson*, 56 Ill. 138.]

¹ *Tate v. Hyslop*, L. R. 15 Q. B. D. 368; *Phoenix Insurance Co. v. Erie Transportation Co.* 117 U. S. 312. [If the policy contains the clause, "This insurance shall not inure to the benefit of any carrier," and there is nevertheless a stipulation in the bill of lading that the carrier shall have the benefit of the insurance, the insured cannot recover upon the policy. The insurer in this case is practically a surety, and since the insured has, by the terms of the bill of lading, defeated his right to subrogation, he is released: *Carstairs v. Mechanics', &c. Insurance Co.* 18 Fed. Rep. 473.]

CHAPTER XXIII.

MORTGAGES.

640. UNDER this title I propose to treat only of such matters relating to mortgages as are peculiar to a court of equity. In form a mortgage is a conveyance (or feoffment) of real estate upon the condition subsequent that, if the grantor pays the sum named, or performs such other stipulation as may be prescribed by the condition, by a fixed day, the conveyance shall become void.

At common law it was considered as vesting an estate in the mortgagee, defeasible only on the strict performance by the grantor of the condition subsequent at the time named therein. No day of grace was allowed. And therefore, if the condition was not strictly performed according to its terms, the estate vested irredeemably in the mortgagee, and all right of the mortgagor thereto was gone.

But that what was intended merely as a security for a debt should thus be converted into an absolute conveyance simply by the failure of the debtor to pay upon the precise day, was repugnant to the notions of justice entertained by the Court of Chancery. Operating, therefore, *in personam* upon the conscience of the mortgagee, it soon adjudged that what was intended as a security should operate as a security only, and that the mortgagor should have a right to redeem the estate by paying the debt within a reasonable time. And thus grew up the equity of redemption.¹

The equity of redemption was a pure creation of the Court of Chancery; it was designed to prevent the hardships and injustice which made a mere delay in payment operate as the forfeiture of an estate, and it well deserves

¹ [Bowen v. Edwards, 1 Ch. Rep. mortgage is viewed in the various States, see Jones on Mortgages, 221; Willett v. Winnell, 1 Vern. 488. For the different lights in which a § 17 *et seq.*]

the warm encomium which Chancellor Kent passed upon it: "The case of mortgages is one of the most splendid instances in the history of our jurisprudence of the triumph of equitable principles over technical rules, and of the homage which those principles have received by their adoption in the courts of law." ¹

What constitutes a Mortgage in Equity.

641. First, whatever is a mortgage at law is so in equity.

The ordinary deed of mortgage is a deed of conveyance with the condition or proviso inserted in it that, if the grantor (the mortgagor) pays the sum named, or performs such other stipulation as the mortgage may be given to secure, by a day named, then the deed is to be void, but otherwise it is to remain in full force.² This form of conveyance is a mortgage both at law and in equity.

642. DEED AND DEFEASANCE. — Sometimes, however, the debtor gives an absolute deed, and the creditor gives in return a defeasance, as it is called, *i. e.* a bond that he will reconvey the estate to the debtor upon payment of the debt and interest by the day named. These two instruments, the deed and the defeasance, are regarded as but one instrument in equity, and taken together they constitute a mortgage, — nothing more, — and the relation of the parties is that of mortgagor and mortgagee.³

643. To constitute a mortgage the instruments must be in effect contemporaneous.⁴ Their mere dates are unimportant. If they were delivered at the same time as one transaction, they constitute but one instrument, although the deed may have been dated and executed long before. The

¹ 4 Kent Com. § 158, 13th ed. 16; Marshall v. Stewart, 17 Ohio,

² [Burnett v. Wright, 135 N. Y. 543.] 356; Copeland v. Yoakum, 38 Mo. 349; Ferris v. Wilcox, 51 Mich. 105.]

³ [Baker v. Wind, 1 Ves. Sr. 160; Erskine v. Townsend, 2 Mass. 493; Lane v. Shears, 1 Wend. 433; Friedley v. Hamilton, 17 S. & R. 70; Watkins v. Gregory, 6 Blackf. (Ind.) 113; Bearss v. Ford, 108 Ill. 105.] ⁴ Murphy v. Calley, 1 Allen, 107; [McLaughlin v. Shepherd, 32 Me. 143. See, also, Swetland v. Swetland, 3 Mich. 482.]

delivery, if simultaneous, fixes the date and character of the transaction.¹

In the case of *Harrison v. Phillips Academy* the court said: "All that is necessary to make a bond with condition to reconvey a defeasance is, that it shall appear to be one and the same transaction with the deed, part indeed of the same conveyance. And this purpose is fully answered if, when the deed is delivered, the bond is also made and delivered, — although the former may be of a much older date than the latter."²

In this case the deed had been made by the grantor, and deposited in the registry of deeds for record, a month before the grantee knew of its existence. When notified, he accepted the deed and gave in return the bond of defeasance in question. The court held that the two instruments constituted a good mortgage.

644. So, it has been held that where there was an oral agreement on receiving a deed to give back a bond of defeasance when requested, and such bond was subsequently given in fulfilment of the promise, it related back to the delivery of the deed and "made it a mortgage."³

But if no defeasance is given when the deed is delivered, and no agreement for such a defeasance then exists, the character of the transaction is fixed; and if a bond is subsequently given, the original deed does not thereby become a mortgage. The bond is only effective as an agreement to resell and reconvey the estate, and no element of mortgage exists in the case.

All the cases proceed upon this basis, namely, to constitute a mortgage, the defeasance must be, either actually or by relation, contemporaneous with the deed.⁴

645. At law, in order to make a mortgage, the defeasance

¹ [*Brown v. Holyoke*, 53 Me. 9; will not relate back at law: *Lund Haines v. Thompson*, 70 Pa. St. 434; *v. Lund*, 1 N. H. 39; *Hale v. Jewell*, *Lentz v. Martin*, 75 Ind. 228; *Jeffery v. Hursh*, 58 Mich. 246.] *7 Greenleaf*, 435.]

² 12 Mass. 455, 463.

³ *Lovering v. Fogg*, 18 Pick. 540; *v. Skinner*, 17 Pick. 213; *Kelly v. [Reitenbaugh v. Ludwick]*, 31 Pa. St. *Thompson*, 7 Watts, 401.]

131. The bond subsequently given

must be of as high a nature as the deed, *i. e.* it must be under seal;¹ but in equity an unsealed defeasance will operate as an equitable mortgage.² In both of the Massachusetts cases cited in the note the defeasance was not under seal, and the court, while admitting that it constituted an equitable mortgage, could not give it such an effect, because at that time the court had no jurisdiction in equity over equitable mortgages.

646. DEED AND BOND TO RECONVEY. — I have treated thus far the simple case where the bond of defeasance is in terms for a reconveyance upon payment of the debt; and in such a case there is no doubt upon the face of the papers that the transaction was, and was intended to be, a mortgage. But the grantee of a deed often gives back a bond binding himself to reconvey the estate to the grantor upon the payment of a certain sum by a day named. This sum is not spoken of as a debt, and the important and often difficult question arises whether under these circumstances the transaction is a mortgage, or simply a purchase from the grantor, with an agreement by the purchaser that he will sell back again on receiving the amount of the purchase-money and interest by a certain fixed day. This is the question now briefly to be considered.

The importance of the distinction between the two cases is obvious. If the transaction amounts to a mortgage, then there inevitably attaches to it the equity of redemption in behalf of the mortgagor, and his right to the estate is not forfeited although he fails to pay the stipulated amount by the time prescribed in the bond. On the other hand, if the transaction is an absolute sale, with a mere agreement in return that the original grantor may repurchase, then the latter must be ready to perform his part by paying the price at or about the time fixed, or his right is forfeited. There is no equity of redemption in such a case.

Parties unquestionably have the right to make a contract for the repurchase of property, and when this is the real

¹ [Murphy v. Calley, 1 Allen, 107; Warren v. Lovis, 53 Me. 463; Runlet v. Otis, 2 N. H. 167.] ² Eaton v. Green, 22 Pick. 526; Kelloran v. Brown, 4 Mass. 443.

intent and character of the transaction there is no justice or equity in converting what the parties meant to be a sale into a mortgage.¹ But as the form of a sale is often resorted to where the real transaction is a loan with security, as a mere cloak and a device to deprive the debtor of his right of redemption, courts of equity view such arrangements with the utmost suspicion, and are always disposed to regard them as in effect mortgages. The true doctrine was thus stated by Chief Justice Marshall in *Conway v. Alexander*:²

“To deny the power of two individuals capable of acting for themselves to make a contract for the purchase and sale of lands defeasible by the payment of money at a future day, or, in other words, to make a sale with a reservation to the vendor of a right to repurchase the same land at a fixed price and at a specified time, would be to transfer to the Court of Chancery, in a considerable degree, the guardianship of adults as well as of infants. Such contracts are certainly not prohibited either by the letter or the policy of the law. But the policy of the law does prohibit the conversion of a real mortgage into a sale. And as lenders of money are less under the pressure of circumstances which control the perfect and free exercise of the judgment than borrowers, the effort is frequently made by persons of this description to avail themselves of the advantage of this superiority in order to obtain inequitable advantages. For this reason the leaning of courts has been against them, and doubtful cases have generally been decided to be mortgages. But as a conditional sale, if really intended, is valid, the inquiry in every case must be whether the contract in the specific case is a security for the repayment of money or an actual sale.”

Subsequent cases confirm the position that the leaning of the courts is to regard all doubtful cases as mortgages.³

¹ [Williams v. Owen, 5 Myl. & Cr. 303; Perry v. Meddowcroft, 4 Beav. 197; Cornell v. Hall, 22 Mich. 377; Trucks v. Lindsey, 18 Iowa, 504; Glover v. Payn, 19 Wend. 518.]

² 7 Cranch, 218, 236.

³ [Manlove v. Bale, 2 Vernon, 84; Dougherty v. McColgan, 6 Gill

& J. 275; Pensoneau v. Pulliam, 47 Ill. 58; Davis v. Stonestreet, 4 Ind. 101; Turner v. Kerr, 44 Mo. 429; King v. McCarthy, 50 Minn. 222; Cosby v. Buchanan, 81 Ala. 574; Gilchrist v. Beswick, 33 W. Va. 168.]

647. Another preliminary remark is necessary. If the transaction is a sale, then very clearly the purchaser has no personal claim against the grantor. If, for instance, the land was taken in payment of a preëxisting debt, the debt is thereby discharged, and the purchaser (the former creditor) has no further claim against the grantor. If, on the other hand, the transaction is to be regarded as a mortgage, then, notwithstanding the conveyance, the debt still exists, the debtor is still liable for it, because the land is merely security for its payment; the debtor is liable for the whole debt; or, if the land should prove insufficient to pay the debt, the debtor would still be liable for the deficiency.¹

648. How, then, can we determine whether the particular transaction is a sale or a mortgage? So far as I have been able to gather from the cases, the following are the chief *indicia*:—

(a) Whenever the consideration of the deed is a preëxisting debt due from the grantor to the grantee, and there is an agreement to reconvey upon the repayment of the same amount with interest, the transaction will be considered as a mortgage.²

(b) Where there is no preëxisting debt, but the agreement is to reconvey on the repayment of the consideration of the deed with interest, the transaction will be considered as a mere loan, with a mortgage for its security.³ That is to say, in the two cases just stated, where nothing appears except the circumstances mentioned, the conclusion of the court undoubtedly would be that the transaction was a mortgage.

(c) Whenever there is a stipulation that, if the original grantor does not pay the money within the time specified, "there shall be no right of redemption," or "no further right of redemption," or other equivalent words, this is decisive

¹ [1 Jones on Mortgages, § 256.]

² [Enos v. Sutherland, 11 Mich. 538; Kellum v. Smith, 33 Pa. St. 158; Voss v. Eller, 109 Ind. 260. The payment of rent in lieu of interest tends to show that the trans-

action was a mortgage: Woodward v. Pickett, 8 Gray, 617.]

³ [Marshall v. Stewart, 17 Ohio, 356; Parmelee v. Lawrence, 44 Ill. 405; Cross v. Hepner, 7 Ind. 359; Brown v. Nickle, 6 Pa. St. 390.]

that the transaction was a loan and not a sale, and therefore that the instruments create a mortgage.¹

(d) Where the value of the land is much in excess of the sum paid, that furnishes a strong reason for holding the transaction to be a mortgage.² So, on the other hand, if the price is a fair equivalent for the land, that is one reason for regarding the transaction as a sale.³

(e) Where the price to be paid on reconveyance is greater than the original consideration, the presumption is that a sale was intended.

(f) In order that the instruments in question shall constitute a mortgage, there must be either a preëxisting debt or a present loan which is the consideration for the conveyance. If there was no preëxisting debt, then the essence of the transaction, in order that it shall constitute a mortgage, must be that there is a loan by the grantee to the grantor. The relation of the parties must be that of borrower and lender, debtor and creditor; there must be a subsisting debt, either preëxisting or created by the loan, in order to make a mortgage.⁴

(g) If the negotiation was not for a loan, but simply for a sale and repurchase, equity will not convert the transaction into a mortgage, although the amount to be paid on a reconveyance is the same as that paid on the original sale.⁵ The courts attach great importance to this consideration in determining the true nature of the transaction.

In *Conway v. Alexander*⁶ the court said: "The proof is also complete that there was no negotiation between the parties respecting a loan of money; no proposition ever made respecting a mortgage. . . . To this circumstance the court attaches much importance. Had there been any treaty, any

¹ *Murphy v. Calley*, 1 Allen, 107.

² [*Douglas v. Culverwell*, 3 Gif. 251; *Peugh v. Davis*, 96 U. S. 332; *Flagg v. Mann*, 2 Sumner, 486; *Wharf v. Howell*, 5 Binney (Pa.), 499; *Wilson v. Patrick*, 34 Iowa, 362; *Baker v. Smith*, 44 La. Ann. 925.]

³ [*Robinson v. Cropsey*, 6 Paige, 480; *Rodgers v. Moore*, 88 Ga. 88.]

⁴ [*King v. King*, 3 P. Wms. 358;

Peugh v. Davis, 96 U. S. 332; *Slowey v. McMurray*, 27 Mo. 113; *Rogers v. Jones*, 92 Cal. 80.]

⁵ [*Matheney v. Sandford*, 26 W. Va. 386; *Cobb v. Day*, 106 Mo. 278.]

⁶ 7 Cranch, 218, 238.

conversation respecting a loan or a mortgage, the deed might have been with more reason considered as a cover intended to veil a transaction differing in reality from the appearance it assumed. But there was no such conversation. The parties met and treated upon the ground of sale, and not of mortgage."

In *Flagg v. Mann*¹ the court attached equal importance to the fact that there was no treaty for a loan. So, also, in *Horbach v. Hill*.²

To these observations I think it may be added that, if the grantor should originally propose a loan, and the purchaser should in good faith decline to make a loan, or to trammel himself with a mortgage, but should be willing to purchase at a definite price, agreeing to resell within a certain period at the same price, with interest, the transaction ought not to be treated as a mortgage.³

649. The fact that the vendor gives no covenant or other obligation to repay the money is of considerable importance in showing that the transaction was not a loan but a sale.⁴

In *Conway v. Alexander*, *supra*, the court said (p. 237): "The want of a covenant to repay the money is not complete evidence that a conditional sale was intended, but is a circumstance of no inconsiderable importance. If the vendee must be restrained to his principal and interest, that principal and interest ought to be secure. It is therefore a necessary ingredient in a mortgage that the mortgagee should have a remedy against the person of the debtor. If this remedy really exists [*i. e.* if the transaction is really a mortgage], its not being reserved in terms will not affect the case. But it must exist in order to justify a construction which overrules the express words of the instrument."

¹ 14 Pick. 467.

² 112 U. S. 144.

³ [*De France v. De France*, 34 Pa. St. 385.]

⁴ [*Holmes v. Grant*, 8 Paige, 243; *Henley v. Hotaling*, 41 Cal. 22. But this consideration is by no means conclusive: *Matthews v. Sheehan*, 69

N. Y. 585; *Bacon v. Brown*, 19 Conn. 29; *Locke v. Moulton*, 96 Cal. 21; *Macauley v. Smith*, 132 N. Y. 524. See, also, *Goodman v. Grierson*, 2 Ball & B. 274; *Wing v. Cooper*, 37 Vt. 169; *Niggeler v. Maurin*, 34 Minn. 118.]

In *Murray v. Riley*¹ the court said: "Where the intent that a transaction shall constitute a mortgage is not clear, the fact that there is no collateral undertaking to pay the money is important. As in such case the holder of the estate must bear the loss if property depreciates, it is equitable that he should have the profit arising from any subsequent advance in value of the estate, if the terms of the bond are not complied with."

In *Murphy v. Calley*² there was no such covenant or collateral understanding. The court admitted that its absence was a material circumstance, but held nevertheless that there was no doubt of the intent of the parties to create a mortgage.

650. POSSESSION. — If the grantor retains possession of the estate, that circumstance is very significant that the transaction is a mortgage.³ If the grantee assumes and keeps possession, it points the other way.⁴

651. INTENT. — In determining whether the transaction is a mortgage or sale, the controlling consideration is the intent of the parties themselves.⁵ If their purpose is that security shall be given for a debt or loan, no artifice should be allowed to deprive the debtor of his equity of redemption by putting the transaction in the form of a sale; but if, on the other hand, the parties in good faith intend a sale, justice equally demands that full effect should be given to that intention.

This intention is to be derived not only from the documents, but from all the "extrinsic circumstances" attending

¹ 140 Mass. 490, 493.

² 1 Allen, 107.

³ [Lincoln v. Wright, 4 De G. & J. 16; Bentley v. Phelps, 2 Woodb. & M. 426; Clark v. Finlon, 90 Ill. 245; Matheney v. Sandford, 26 W. Va. 386; Wilson v. Giddings, 28 Ohio St. 554; Cobb v. Day, 106 Mo. 278.]

⁴ [Rich v. Doane, 35 Vt. 125; Bennet v. Holt, 2 Yerger, 6. But see Clark v. Landon, 90 Mich. 83,

where the facts showed the conveyance to be a mortgage, although the grantee assumed possession. See, also, Murdock v. Clarke, 90 Cal. 427.]

⁵ [Brown v. Dewey, 1 Sandf. Ch. 56, 64; Shields v. Russell, 66 Hun, 226; Douglass v. Moody, 80 Ala. 61; Hanford v. Blessing, 80 Ill. 188. See, also, Bogk v. Gassert, 149 U. S. 17.]

the transaction.¹ Parol proof of such extrinsic circumstances is clearly admissible.²

In *Conway v. Alexander*, *supra* (at p. 238), the court said: "Having made these observations on the deed itself, the court will proceed to examine those extrinsic circumstances which are to determine whether it is to be construed a sale or a mortgage."

And in *Campbell v. Dearborn*³ the court, referring to *Flagg v. Mann*,⁴ said: "The case of *Flagg v. Mann* is explicit not only upon the authority of the court thus to deal with the written instruments of the parties, but also upon the point of the competency of parol testimony to establish the facts by which to control their operation."

The extrinsic circumstances which have been considered material are the previous relations of the parties, and more especially the negotiations which preceded and led to the conveyance, — whether those negotiations were for a sale or a loan being, as I have said, a point of much significance.

652. Under all circumstances, the deed and the agreement to reconvey must be between the same parties in order to constitute a mortgage. If, therefore, the bond to reconvey is given to the grantor and to a third person, and, *a fortiori*, if it be given to a third person alone, it is not such a defeasance as constitutes a mortgage.⁵

653. Whenever an absolute deed is given in fact as a security for a debt, equity will treat the deed as a mortgage,

¹ [Crowell v. Keene, 159 Mass. 352; Butts v. Robson, 5 Wash. St. 268; King v. McCarthy, 50 Minn. 222.]

² [Williams v. Bishop, 15 Ill. 553; Heath v. Williams, 30 Ind. 495; Ross v. Brusie, 64 Cal. 245; and the cases cited above.]

³ 109 Mass. 130, 141.

⁴ 14 Pick. 467, *supra*.

⁵ Treat v. Strickland, 23 Me. 234; [Pennsylvania Co. v. Austin, 42 Pa. St. 257; Low v. Henry, 9 Cal. 538, 549. That this is the rule

at law, but not in equity, see 1 Jones on Mortgages, § 241.]

The following cases, in addition to those already cited, may be consulted upon the general subject: Williams v. Owen, 5 Myl. & Cr. 303; Rich v. Doane, 35 Vt. 125; Holmes v. Grant, 8 Paige, 243; Baker v. Thrasher, 4 Denio, 493; Macaulay v. Porter, 71 N. Y. 173; Glover v. Payn, 19 Wend. 518; O'Reilly v. O'Donoghue, Irish Rep. 10 Eq. 73; Bayley v. Bailey, 5 Gray, 505.

although no written bond or defeasance was given in return; and oral evidence will be admitted to prove the real nature of the transaction.

This holds true not only where there was a contemporaneous understanding or agreement that such defeasance should be given and it has not been given, but also where it was expressly agreed that no such defeasance should be given, the debtor relying entirely upon the good faith of the creditor. In all these cases equity converts the absolute deed into a mortgage.¹

In the outset this doctrine was attempted to be maintained on the ground of accident, mistake, or fraud, upon the suggestion that, inasmuch as a defeasance was contemplated by the parties, the omission to give it was the result of accident or fraud against which equity would relieve.² But when the courts came to treat as a mortgage a deed given with no expectation of a defeasance in return, but with the express understanding that none was to be given, the original ground had to be abandoned, because there was then no pretence for saying that the defeasance had been omitted through accident or fraud.

654. The present theory of the courts, so far as I understand it, is this: Inasmuch as the true transaction is a security for a debt, an absolute deed is vicious and fails to represent the true transaction as grossly as if it had been obtained by fraud. As, however, he who seeks equity must also do equity, a Court of Chancery will not pronounce the deed void, *i. e.* will not refuse it any effect; but, since it was intended really to be a mortgage, they will treat it as a mortgage and hold it binding upon the maker to that extent; and therefore

¹ [Taylor v. Luther, 2 Sumner, overruling Lee v. Evans, 8 Cal. 424; 228; Morris v. Nixon, 1 How. 118; Clark v. Henry, 2 Cowen, 324. *Contra*, Watkins v. Stockett, 6 Har. & Kunkle v. Wolfersberger, 6 Watts, J. (Md.) 435.]

126; Wright v. Bates, 13 Vt. 341; ² [Joynes v. Statham, 3 Atk. 388; Hughes v. Edwards, 9 Wheat. 489; Montacute v. Maxwell, 1 P. Wms. 618; Brainerd v. Brainerd, 15 Conn. 575; Stevens v. Cooper, 1 Johns. Ch. 425; Bank v. Whyte, 3 Md. Ch. 508.]

Miller v. Thomas, 14 Ill. 428; Phillips v. Hulsizer, 20 N. J. Eq. 308; Baird v. Birmingham, 87 Iowa, —; Pierce v. Robinson, 13 Cal. 116,

they will require him to do equity by allowing the deed to stand as a mortgage security for the debt which it was really intended to secure.

This theory enables the courts to hold that the statute of frauds is not violated by the admission of parol evidence in these cases. The object of the testimony is, not to vary the terms of the instrument, but to show that the instrument itself is vicious and void, just as in the case of fraud; and therefor equity steps in, and by holding the grantor to do equity, allows the instrument to stand for what it was originally intended to be.¹

Whatever criticisms we may be disposed to pass upon this reasoning, the rule itself is now settled in equity that an absolute deed will be turned into a mortgage upon satisfactory parol proof that such was the real agreement of the parties.²

655. Where a creditor obtained judgment and levied execution upon land of the debtor, making a verbal agreement with the debtor that he would hold the land merely as security for the debt, and would reconvey it on payment of the debt, this was held to constitute a mortgage in equity.³

The proof that the deed was intended to operate only as a mortgage "must be clear, unequivocal, and convincing."⁴

656. Where such an oral contract is set up, equity will recognize and enforce all of its terms, and will not allow the

¹ This doctrine is well stated in *Campbell v. Dearborn*, 109 Mass. 180.

² *Babcock v. Wyman*, 19 How. 289; *Russell v. Southard*, 12 How. 189. [Except in Alabama, Florida, Kentucky, and Maryland. See *Jones on Mortgages*, § 282. But at law such evidence is, in most of the States, excluded. See *Flint v. Sheldon*, 13 Mass. 443; *Richardson v. Woodbury*, 43 Me. 206; *Webb v. Rice*, 6 Hill, 219; *Reading v. Weston*, 8 Conn. 117; *Hogel v. Lindell*, 10 Mo. 483; *Farley v. Goocher*, 11 Iowa, 570; *Moore v. Wade*, 8 Kans. 380.]

³ *Cullen v. Carey*, 146 Mass. 50. [See, further, *Phelan v. Fitzpatrick*, 84 Wis. 240; *Crane v. Buchanan*, 29 Ind. 570; *Palmer v. Gurnsey*, 7 Wend. 248; *Cook v. Bartholomew*, 60 Conn. 24.]

⁴ *Coyle v. Davis*, 116 U. S. 108; *Cadman v. Peter*, 118 U. S. 73, 80; [*Howland v. Blake*, 97 U. S. 624; *Ganceart v. Henry*, 98 Cal. 281; *Barton v. Lynch*, 69 Hun, 1. For decisions in the several States as to when an absolute deed will be considered a mortgage, see *Jones on Mortgages*, § 335.]

debtor to insist upon what is for his benefit and to ignore the rest.

Thus, where the oral agreement was that the deed should be a security for the debt due to the grantee, and that, in case it was not paid at the time fixed, the grantee (the creditor) might sell the estate and apply the proceeds in payment of his debt, it was held that a sale under the agreement was valid.

“The deed is to be read in equity precisely as if the agreement were set out therein. . . . The condition must be taken as a whole [*i. e.* the power to sell on default] ; no part of it can be rejected.”¹

¹ Jackson v. Lawrence, 117 U. S. 679, 682.

CHAPTER XXIV.

MORTGAGES (CONTINUED).

657. ANOTHER form of equitable mortgage is by deposit of title-deeds. This, however, is peculiar to England, and it has no application, so far as I know, in the United States.

In England, except in the two counties of Middlesex and York, there is no provision for the public registry of deeds. Whenever, therefore, a purchase or mortgage of real estate occurs, all the previous existing conveyances which constitute the muniments of title are of primary importance. The title must be traced through them. They must all be produced or accounted for, else no perfect title can be given, and each new purchaser of the title necessarily succeeds to the possession of all the previous conveyances. Consequently, whoever has these in his possession has within his grasp the whole title, or rather the means of establishing the title. It is not strange, then, that a singular significance should be attributed to the deposit by the owner of all his title-deeds; and when such a deposit has been made for the purpose of giving security to a creditor, it has been held in equity to amount to an equitable mortgage of the estate. Such equitable mortgages are in use and are fully recognized in England.¹

658. In this country, however, the system is entirely different, — at least in most of the States. There is a public registry in each county, where every conveyance may be and should be recorded; and it is to that public record that purchasers and creditors look, and have a right to look, to ascertain the true condition of a title, and they have the right to govern themselves accordingly.

The previous original deeds are of little or no consequence,

¹ National Provincial Bank of D. 1; Lloyd's Banking Co. v. Jones, England v. Jackson, L. R. 33 Ch. L. R. 29 Ch. D. 221.

and are seldom called for, inasmuch as the public record is sufficient for all purposes. A mere deposit of title-deeds, therefore, would have no peculiar significance in this country, and I am not aware of any case where such a deposit has been held to be an equitable mortgage, or where the question has arisen. But if it should appear that such a deposit had been made with intent to give security to a creditor, I know of no reason why effect should not be given to it as an equitable mortgage. Of course it would be inoperative as against any subsequent purchaser or mortgagee who took without notice of this equitable claim.¹

Nature of the Mortgagor's and Mortgagee's Interest.

659. The interest of the mortgagor in the estate mortgaged, *i. e.* his equity of redemption, is real estate. It descends to his heirs at law, and is subject to dower and curtesy.²

660. On the other hand the interest of the mortgagee, until after foreclosure, is only a chattel interest. The debt is considered the main thing, the mortgage a mere incident.³ And therefore, upon the death of the mortgagee, the mortgage passes to his executors or administrators as part of his personal estate, and not to his heirs at law; and there is no right to curtesy or dower in the interest of a deceased mortgagee.⁴

¹ [See, further, *Rockwell v. Hobby*, 2 Sandf. Ch. 9; *Hall v. McDuff*, 24 Me. 311; *Jarvis v. Dutcher*, 16 Wis. 307. To the effect that a mortgage cannot thus be created, see *Shitz v. Dieffenbach*, 3 Pa. St. 233.]

² [*Titus v. Neilson*, 5 Johns. Ch. 452; *Wilkins v. French*, 20 Me. 111; *Snow v. Stevens*, 15 Mass. 278.]

³ [*Southerin v. Mendum*, 5 N. H. 420; *Marshall v. Hadley*, 50 N. J. Eq. 547.]

⁴ [*Tabor v. Grover*, 2 Vern. 367; *Chase v. Lockerman*, 11 Gill & J. 185, 210; *Bickford v. Daniels*, 2 N. H. 71; *Palmer v. Stevens*, 11 Cush. 147. Neither can the mort-

gagee's interest be levied upon and taken on execution by creditors before foreclosure: *City of Norwich v. Hubbard*, 22 Conn. 588; *Blanchard v. Colburn*, 16 Mass. 345; *Jackson v. Willard*, 4 Johns. 41; *Smith v. People's Bank*, 24 Me. 185; *Glass v. Ellison*, 9 N. H. 69. See, also, *Prout v. Root*, 116 Mass. 410. On the other hand an equity of redemption may be sold on execution: *Waters v. Stewart*, 1 Caines' Cas. (N. Y.) 47; *Carpenter v. First Parish in Sutton*, 7 Pick. 49; *Ford v. Philpot*, 5 H. & S. 312; *Clinton Bank v. Manwarring*, 39 Iowa, 281.]

661. Upon the delivery of a mortgage the right to immediate possession of the premises is vested in the mortgagee.¹ Modern mortgages, however, usually contain a covenant that the mortgagor shall be entitled to retain possession of the estate until a breach of the condition of the mortgage. In all such cases no right of possession exists in the mortgagee until a breach of condition has occurred.

Where no such exception is made, or, after breach of the condition, if the mortgagor remains in possession, it is at the sufferance of the mortgagee, and as a *quasi* tenant at will,—not strictly a tenant at will, because he is not entitled to the notice which a tenant at will is entitled to before being obliged to remove from the premises.²

662. The mortgagor, if in possession, can commit no waste, nor do anything to impair the permanent value of the estate and thus diminish the value of the mortgagee's security. Equity will promptly restrain any attempt of this nature on the part of the mortgagor.³

Nor can the mortgagor, after the mortgage is made, make a lease which will be binding upon the mortgagee. If a lease is subsisting upon the premises when the mortgage is taken, it is the duty of the tenant, upon request of the mortgagee, to attorn to him and pay the rent to him thereafter.⁴

With these qualifications, the mortgagor, as between him-

¹ [Doe v. Grimes, 7 Blackf. 1; Howard v. Houghton, 64 Me. 445; Brown v. Stewart, 1 Md. Ch. 87.]

² [Rockwell v. Bradley, 2 Conn. 1; Wakeman v. Banks, 2 Conn. 445; Colman v. Packard, 16 Mass. 39; Thunder v. Belcher, 3 East, 449.]

³ [Usborne v. Usborne, 1 Dickens, 75. In such a case it is not necessary to allege the insolvency of the mortgagor; but it must be averred that the injury threatened would be irreparable, and that the security would thereby become in-

adequate: Moriarty v. Ashworth, 43 Minn. 1; Fairbank v. Cudworth, 33 Wis. 358; Brady v. Waldron, 2 Johns. Ch. 148; Nelson v. Pinegar, 30 Ill. 473; Cooper v. Davis, 15 Conn. 556; Murdock's Case, 2 Bland, 461; King v. Smith, 2 Hare, 239; Clapp v. City of Spokane, 53 Fed. Rep. 515. By reference to the above authorities it will be seen that the injunction is granted whether, in the particular State, the mortgagee's interest is regarded as a lien or as a legal estate.]

⁴ [Keech v. Hall, Douglass, 21.]

self and third persons, has all the rights of the absolute owner of the estate, and is to be treated as such.¹

663. **RIGHTS AND DUTIES OF THE MORTGAGEE.** — Where the mortgagee takes possession, he is chargeable with a reasonable and proper rent of the premises if he occupies them personally.² If he does not occupy them personally, he is then chargeable with such rents and profits as he has received, or might have received by the exercise of reasonable care and diligence in letting the premises; but he is not chargeable for rents not received, unless they were lost through his negligence.³

If he permits an insolvent person to remain as tenant, or allows the premises to be unoccupied, not taking the ordinary and reasonable means to procure a tenant, or if he rents them at a sum obviously below the market rate, he is in all these cases chargeable with such an amount as by reasonable care and diligence he might have received.⁴

If the mortgagee lets the premises with a restriction which lessens the rent (as where the mortgagee in possession of a public house required the lessee to covenant that he would buy beer from the mortgagee only), he is accountable to the mortgagor for the reduction in rent thus occasioned.⁵

664. **REPAIRS.** — A mortgagee in possession is also bound to keep the estate in reasonable repair from the rents and

¹ [*The King v. St. Michael's*, Douglas, 630; *Phyfe v. Riley*, 15 Wend. 248, 253. The mortgagor may maintain trespass against the mortgagee: *Runyan v. Mersebau*, 11 Johns. 534. So he may maintain a writ of entry against all but the mortgagee: *Huckins v. Straw*, 34 Me. 166. So the mortgagor cannot be compelled to rebuild if the buildings are destroyed by fire or other casualty: *Campbell v. Maccomb*, 4 Johns. Ch. 534.]

² [*Moore v. De Graw*, 5 N. J. Eq. 346; *Gordon v. Lewis*, 2 Sumner, 143, 155; *Engleman Co. v. Longwell*, 48 Fed. Rep. 129; *Ruckman v.*

Astor, 9 Paige, 517. For the rights of the first and second mortgagee in this respect see *Harrison v. Wyse*, 24 Conn. 1; *Rogers v. Herron*, 92 Ill. 583.]

³ [*McConnel v. Holobush*, 11 Ill. 61; *Milliken v. Bailey*, 61 Me. 316; *Stevens v. Payne*, 42 Ill. App. 202.]

⁴ *Saunders v. Frost*, 5 Pick. 259; *Miller v. Lincoln*, 6 Gray, 556; *Strong v. Blanchard*, 4 Allen, 538; *Gerrish v. Black*, 104 Mass. 400; *Montague v. Boston & Albany Railroad Co.* 124 Mass. 242; [*Neale v. Hagthorp*, 3 Bland, 551, 590.]

⁵ *White v. London Brewery Co.* L. R. 39 Ch. D. 559.

profits, *i. e.* to preserve it, as near as may be, in such condition as it was when he took it, if it was then in suitable condition to rent, and if it was not, he may put it in such condition. But he cannot buy anything for the estate which is merely ornamental, nor can he make any substantial additions or enlargements and charge them to the mortgagor.¹

665. In Massachusetts the mortgagee's liability for rents, and his right to make repairs are regulated by statute.² "If the mortgagee, or any person under him, has had possession of the premises, he shall account for the rents and profits, and shall be allowed for all sums expended in reasonable repairs and improvements, for all sums paid for lawful taxes and assessments, and for all other necessary expenses in the care and management of the premises."

666. The mortgagee is allowed a commission upon the amount of the rents (five per cent. in Massachusetts)³ for his services in collecting them, and for his care of the estate; but if he occupies the estate, he is entitled to no commission.⁴ Nor can he commit any waste of the estate, nor do

¹ [Hughes *v.* Williams, 12 Ves. 493; Woodward *v.* Phillips, 14 Gray, 132; McCumber *v.* Gilman, 15 Ill. 381; Dexter *v.* Arnold, 2 Sumner, 108; Ruby *v.* Abyssinian Society, 15 Me. 306; Dougherty *v.* McColgan, 6 Gill & J. 275. But he may be allowed for substantial improvements made in good faith in the belief that he had acquired an absolute title, especially if the mortgagor has encouraged this belief: Mickles *v.* Dillaye, 17 N. Y. 80; Jones *v.* Jones, 4 Gill, 87; Gillis *v.* Martin, 2 Dev. Eq. (N. C.) 470. The mortgagee is not entitled to the rents and profits until he takes actual possession, though there be a covenant for surrender of the mortgaged property on default of payment: Teal *v.* Walker, 111 U. S. 242. The mortgagee cannot insure the premises and charge the cost to the mortgagor: Dobson *v.* Land, 8 Hare,

216; White *v.* Brown, 2 Cush. 412; Pierce *v.* Faunce, 53 Me. 351. But he may do so if the mortgagor, having agreed to keep the premises insured, fails to insure them: Fowley *v.* Palmer, 5 Gray, 549; Mix *v.* Hotchkiss, 14 Conn. 32. A mortgagee in possession may pay taxes, deducting them from the rents and profits: Burr *v.* Veeder, 3 Wend. 412. So money necessarily spent for counsel fees in defending title to the property may be recovered: Burton *v.* Perry, 146 Ill. 71.]

² Pub. Stats. ch. 181, § 23.

³ [But this rule is not invariable: Gerrish *v.* Black, 104 Mass. 400. Formerly no trustees (mortgagees included) were allowed compensation: French *v.* Baron, 2 Atk. 120; Clark *v.* Smith, 1 N. J. Eq. 121; Harper *v.* Ely, 70 Ill. 581.]

⁴ Gibson *v.* Crehore, 5 Pick. 146; Tucker *v.* Buffum, 16 Pick. 46. Ea-

anything which substantially diminishes its permanent value. As in the case of a mortgagor, so also, if a mortgagee attempts to commit waste, equity will promptly restrain him.¹

The Mortgagor's Right to Redeem.

667. The great incident of a mortgage, so far as the mortgagor is concerned, is his inalienable right to redeem. His right to the estate is not forfeited by a breach of the condition, *i. e.* by failing to pay the amount due at the fixed day, but he has thereafter a reasonable opportunity to redeem his estate by paying what is equitably due to the mortgagee.

I have called it his "inalienable right," and such it is in strictness. A court of equity will not allow a mortgagor to surrender this right (except for a proper consideration), and it will treat all attempts to do so as illegal and void.

If the mortgage or other instrument contains an express stipulation that, if the mortgagor does not pay by a certain day, all right to redeem shall be barred and gone, or other equivalent expression, such a stipulation will be held contrary to the policy of the law and void. No matter what is the form of the transaction, nor what artifices are used to conceal its true character, it being once established that the transaction was a security for a loan or other debt, no ingenuity of man can deprive the mortgagor of his right to redeem. "Once a mortgage, always a mortgage" is a favorite maxim in equity.²

668. This, however, does not prevent the mortgagor at

ton *v.* Simonds, 14 Pick. 98; *Montague v. Boston & Albany Railroad*, 124 Mass. 242.

¹ [*Farrant v. Lovel*, 3 Atk. 723; *Youle v. Richards*, 1 N. J. Eq. 534.]

² *Clark v. Reyburn*, 8 Wall. 318, 322; [*Newcomb v. Bonham*, 1 Vern. 7; *Vernon v. Bethell*, 2 Eden, 110; *Baxter v. Child*, 39 Me. 110; *Clark v. Henry*, 2 Cowen, 324; *Pritchard v. Elton*, 38 Conn. 434; *Cherry v. Bowen*, 4 Sneed, 415; *Willetts v. Burgess*, 34 Ill. 494. So, upon the

principle embodied in this maxim, a clause restricting the right of redemption to the mortgagee is void: *Johnston v. Gray*, 16 S. & R. 361. Nor can the right of redemption be limited to any particular time: *Youle v. Richards*, 1 N. J. Eq. 534; *Bayley v. Bailey*, 5 Gray, 505. On the other hand, if the original transaction was a sale on condition, no subsequent event short of a new contract can change it into a mortgage: *Kearney v. Macomb*, 16 N. J. Eq. 189.]

any time from conveying to the mortgagee his equity of redemption in full payment of the mortgage debt, if the transaction is *bonâ fide* and free from fraud.¹ "And there is no pretence for supposing fraud where the mortgaged estate is not of more value than the debt for which it was a pledge."² But in such a case the court must be satisfied that under the circumstances the estate is only a fair equivalent for the debt, and that the debt is fully discharged by the conveyance of the estate.

The dangerous period is when the necessitous person wants to borrow; it is then that he is exposed to the imposition of harsh and oppressive terms by the lender, and consequently that is the point which equity carefully guards. But when it comes to the payment of a loan already made, the parties usually stand upon a more equal footing, and there is much less opportunity for oppression by the creditor.

669. If the whole estate is fairly worth only the amount of the debt, there is no reason why the debtor should not release his equity of redemption if the creditor is willing to accept it in full satisfaction of the debt.³ Indeed, a mortgagor may give the mortgaged chattel or estate to the mortgagee if the claims of other creditors do not intervene. If it is a chattel, it may be transferred by parol.⁴

670. WHO MAY REDEEM. — (1) The mortgagor; (2) His heirs or devisees;⁵ (3) The husband or wife of the mortgagor, on paying his or her proper proportion of the debt;⁶

¹ [Hicks v. Hicks, 5 Gill & J. 75; Ala. 337; Moeller v. Moore, 80 Wis. Wynkoop v. Cowing, 21 Ill. 570; 434.]

Vennum v. Babcock, 13 Iowa, 194; ² Harrison v. Phillips Academy, 12 Mass. 455, 465; Trull v. Skinner, 17 Pick. 213.

Odell v. Montross, 6 Hun, 155; Rue v. Dole, 107 Ill. 275; Wilson v. Vanstone, 112 Mo. 315; Clark v. ³ [Miller v. Green, 138 Ill. 565.]

Clough, 65 N. H. 43; DeMartin v. ⁴ Stone v. Jenks, 142 Mass. 519.

Phelan, 47 Fed. Rep. 761. But ⁵ [Lewis v. Nangle, 2 Ves. Sen. 431.]

such a transaction is regarded with great suspicion, and may be overturned on slight evidence of fraud: Villa v. Rodriguez, 12 Wall. 323, 339; Russell v. Southard, 12 How. 139, 154; Hyndman v. Hyndman, 19 Vt. 9; Goree v. Clements, 94 ⁶ [Peabody v. Patten, 2 Pick. 517; Davis v. Wetherell, 13 Allen, 60; Whitcomb v. Sutherland, 18 Ill. 578; Phelan v. Fitzpatrick, 84 Wis. 240.]

(4) Any subsequent mortgagee;¹ (5) An execution creditor;² (6) Any grantee or assignee of the mortgagor.³

The order of their right to redeem is as follows: (1) The execution creditor, if his levy occurs before a subsequent mortgage is given; (2) The subsequent mortgagee; (3) The husband or wife, unless his or her right was released in the original mortgage;⁴ (4) The grantee or assignee; (5) The heir or devisee.

671. WHEN THE ESTATE MAY BE REDEEMED. — Unless the right to redeem has been lost by a decree of the court, or in one of the modes pointed out by statute, it is not barred until the expiration of twenty years after the mortgagee has taken or had possession subsequently to a breach of the condition.⁵

672. If in the mean time the mortgagee, by the receipt of interest from the mortgagor, or by other unequivocal act, has acknowledged his interest in the premises as mortgagor, the right to redeem still exists.⁶

673. MODE OF REDEMPTION. — The mortgagor should

¹ [Bigelow v. Willson, 1 Pick. 182; Grant v. Duane, 9 Johns. 591; 485; Hill v. White, 1 N. J. Eq. 435.] Smith v. Austin, 9 Mich. 465.]

² [Stonehewer v. Thompson, 2 322.]

³ [Dodge v. Kennedy, 93 Mich. 547; Moore v. Beasom, 44 N. H. 215; Farnum v. Metcalf, 8 Cush. 46. And one having an equity in part of the premises has a right to redeem the whole: Boquet v. Coburn, 27 Barb. 230. So of one who has a lease for years of a part: Averill v. Taylor, 8 N. Y. 44. See, further, Emerson v. Atkinson, 159 Mass. 356. A mere volunteer has no right to redeem: Lomax v. Bird, 1 Vernon, 182; Ayres v. Waite, 10 Cush. 72; [Demarest v. Wynkoop, 3 Johns. Ch. 129; Blake v. Foster, 2 Ball & B. 387; Roberts v. Littlefield, 48 Me. 61; Cook v. Finkler, 9 Mich. 131.]

⁴ [See Briggs v. Davis, 108 Mass. 322.]

⁵ [Kerndt v. Porterfield, 56 Iowa, 412; Dexter v. Arnold, 1 Sumner, 109; Pendleton v. Rooth, 1 Giff. 35. The filing of a bill to foreclose is sufficient acknowledgment: Robinson v. Fife, 3 Ohio St. 551. But see Chapin v. Wright, 41 N. J. Eq. 438. A recital of the mortgage in a deed to a third person is sufficient: Hansard v. Hardy, 18 Ves. 455. But the acknowledgment must clearly be made out: Thompson v. Bowyer, 9 Jurist (N. S.), 863.]

tender the amount due and request a discharge of the mortgage. If this be refused, his remedy is by a bill in equity to redeem, setting forth his tender.¹ Upon the bill being brought, if the amount due is in dispute, the court will order an account to be taken, and, when the amount is settled, it will decree a discharge of the mortgage upon payment of the amount of the debt thus ascertained.

Or the mortgagor may bring a bill to redeem without making a previous tender, but offering in his bill to pay whatever shall be found by the court to be due.²

An insufficient tender will not defeat the mortgagor's right to redeem, or cause his bill to be dismissed, if afterward he pays such sum as the court finds to be due; but in such a case he will be charged with costs.

If the mortgagor brings his bill without previous tender, then, also, he will be charged with costs, unless it appears that the mortgagee has unreasonably neglected and refused to render an account, — supposing him to have been in possession.³

674. UPON A BILL TO REDEEM, WHAT IS THE MORTGAGOR BOUND TO PAY? — Of course he is bound to pay the debt named in the condition of the mortgage. But equity has gone a step beyond this. If it appears that the mortgagor has agreed orally that the mortgage shall stand as security for other debts, advances, or liabilities beside those named in the mortgage, he will not be allowed to redeem except upon payment of such debts, as well as of the debt named in the mortgage. The ground of this doctrine is that he who comes into equity for relief must do equity: and therefore a court of equity will neither assist nor permit a mortgagor to redeem unless he pays all the debts or liabilities for which he has agreed that the mortgage shall stand as security.⁴

¹ [Perry v. Carr, 41 N. H. 371; Barton v. May, 3 Sandf. Ch. 450.] Anson, 20 Iowa, 55; Beekman v. Frost, 18 Johns. 544.]

² [But a bill to redeem is not good without an offer to pay what may be found due: Harding v. Pinney, 10 Jurist (N. S.), 872; Kemp v. Mitchell, 36 Ind. 249; Anson v. Mass. Pub. Stats. ch. 181, §§ 21-29; [Willard v. Fiske, 2 Pick. 540; Cushing v. Ayer, 25 Me. 383.]

⁴ [Ogle v. Ship, 1 A. K. Marsh. (Ky.) 287; Brown v. Gaffney, 32

In equity such an oral agreement is good as against the mortgagor, and those claiming under him who have notice of the agreement. But at law such an agreement is invalid, nor is it good in equity against a second mortgagee or purchaser without notice.¹

675. THE EQUITY OF REDEMPTION IS AN INDIVISIBLE ENTITY. — If the mortgage includes several parcels of land, a sale on execution of the equity of redemption, as to one parcel only, is void.² But if the mortgagor has already conveyed his equity in some of the parcels, a sale of his equity in the remaining parcel or parcels is good.³

676. Neither the mortgagor nor any one else can redeem one parcel by paying a proportionate part of the debt. The claim cannot be subdivided, and therefore the whole debt must be paid. There can be no redemption of a part of the mortgaged estate by payment of a proportionate part of the debt.⁴

In an English case the mortgage included both real and personal estate as security for the same debt. The mortgagor died, leaving a will which, it was admitted, did not pass his real estate, and the heir at law could not be found. Under these circumstances the court allowed the executrix of the mortgagor to redeem the real as well as the personal estate, since she could not redeem the personal estate alone without paying the entire debt.⁵

The Mortgagee's Right to Foreclose.

677. Inasmuch as the primary object of a mortgage is security for the payment of the debt or other obligation

Ill. 251. See, further, *Town of Brighton v. Doyle*, 64 Vt. 616.] ³ *North v. Dearborn*, 146 Mass. 17.

¹ *Joslyn v. Wyman*, 5 Allen, 62; *Stone v. Lane*, 10 Allen, 74; *Upton v. National Bank of South Reading*, 120 Mass. 153; *Taft v. Stoddard*, 142 Mass. 545. ⁴ *Webster v. Foster*, and *North v. Dearborn*, *supra*; *Boynton v. Brastow*, 53 Me. 362, 366; [*Palk v. Lord Clinton*, 12 Ves. 48, 59; *Street v. Beal*, 16 Iowa, 68; *Franklin v. Gorham*, 2 Day (Conn.), 142; *Lehman v. Moore*, 93 Ala. 186.]

² *Cochran v. Goodell*, 131 Mass. 464; *Webster v. Foster*, 15 Gray, 31. ⁵ *Hall v. Heward*, L. R. 32 Ch. D. 430.

therein named, there is a corresponding equity in behalf of the mortgagee that the security shall thus be applied, and that he shall not be obliged to wait indefinitely for payment of his debt.

In England, after a breach of condition, the only remedy of the mortgagee originally was by a bill in equity praying either that the estate might be sold and applied to the payment of the debt, so far as was necessary, or else that, unless the mortgagor paid within some reasonable time, the mortgage might be foreclosed. Upon a bill to foreclose, according to the established rule in equity, some reasonable time must be allowed to the mortgagor by the decree to pay the debt. This time is fixed by the Chancellor at his discretion, where there is no statute regulating the matter.¹ In England, from time immemorial, this period has been six months, and it is the same in the United States courts,² except where a different period has been fixed by a statute of the State in which the land lies.

678. In this country the foreclosure of mortgages has been regulated, perhaps universally, by statutes of the respective States.

In Massachusetts three modes are provided for foreclosing mortgages after a breach of condition. (1) The first is by an open and peaceable entry upon the premises, — an entry *in pais*, as it is called, which, if possession be retained for three years, forecloses the right of redemption. This entry must be made in the presence of two witnesses, and their certificate must be recorded.

Or (2) the mortgagee may bring a suit at law against the mortgagor or other person in possession of the premises,

¹ [Farrell v. Parlier, 50 Ill. 274; Perine v. Dunn, 4 Johns. Ch. 140; Harkins v. Forsyth, 11 Leigh (Va.), 294. A decree foreclosing at once cannot be sustained: Clark v. Reyburn, 8 Wall. 318. Modern equity courts seldom decree a strict foreclosure vesting the title in the mortgagee. Instead they commonly decree a foreclosure by public sale.

For a history of the law upon this point, see Lansing v. Goelet, 9 Cow. 346. A strict foreclosure may be decreed where it is manifestly for the interest of both parties, as, for example, where the land is worth only the amount of the debt: Johnson v. Donnell, 15 Ill. 97; Lockard v. Hendrickson, 52 N. J. Eq. —.]

² Clark v. Reyburn, 8 Wall. 318.

and if he obtains judgment for possession the right of redemption is foreclosed unless the mortgagor redeems within three years thereafter. The provisions on this subject are contained in Massachusetts Public Statutes (ch. 181).

(3) The third mode is by a bill in equity to foreclose.¹ This has been held subject to the proviso that the mortgagee has not a plain and adequate remedy at law. The provisions for an open entry or for a suit at law are so simple that a bill in equity to foreclose a mortgage is seldom resorted to. Ordinarily the mortgagee has a plain and adequate remedy at law by a writ of entry to foreclose his mortgage, and in such a case relief in equity has been denied.²

But whenever, owing to the character of the property itself or to the situation of the parties, adequate relief cannot be had at law, a bill to foreclose will be sustained. Such was the case in *Shaw v. Norfolk County Railroad Co.*,³ where the mortgage given by the defendant corporation included its franchise, and also real estate situated in different counties, so that, in order to foreclose the mortgage at law, it would have been necessary to bring a suit in each county.

679. WHO MAY FORECLOSE. — Inasmuch as the interest of a mortgagee is strictly personal property, the foreclosure must be by himself, if he is living; if he is dead, by his executor or administrator, or, in case of any previous sale or transfer, by his assignee.⁴

680. Since the debt is the principal and the security is the incident, where a mortgage is given to secure a negotiable promissory note or other debt, and the mortgagee has transferred the note but has not assigned the mortgage, the

¹ Jurisdiction in equity of suits to foreclose is conferred by Mass. Pub. Stats. ch. 151, § 2, clause 1. [The mortgagee has a right to bring his different actions simultaneously; the remedies are concurrent: *Gilman v. Illinois, &c. Telegraph Company*, 91 U. S. 603, 615; *Trustees of Smith Charities v. Connolly*, 157 Mass. 272; *Ely v. Ely*, 6 Gray, 439; *Jackson v. Hull*, 10 Johns. 481; *Smith v. Shuler*, 12 S. & R. 240.]

² *Lowell v. Daniels*, 2 Cush. 234; *Boston & Fairhaven Iron Works v. Montague*, 108 Mass. 248.

³ 5 Gray, 162, 183.

⁴ [*Roath v. Smith*, 5 Conn. 133; *Miller v. Henderson*, 10 N. J. Eq. 320. The survivor of two joint mortgagees may foreclose: *Blake v. Sanborn*, 8 Gray, 154; *Martin v. McReynolds*, 6 Mich. 70.]

assignee of the debt is in equity entitled to the benefit of the mortgage, and the mortgagee will be held to hold it in trust for him.¹

This is true even where one only of several notes secured by the mortgage has been transferred.² But, in Massachusetts at least, the assignee cannot maintain an action at law in his own name to foreclose the mortgage.³

681. WHEN IS THE RIGHT TO FORECLOSE BARRED?—If the mortgagor or those claiming under him have been in peaceable and uninterrupted possession of the mortgaged premises for twenty years after the mortgage debt, *i. e.* the principal, became payable, the presumption is that the debt has been paid, and, unless the presumption is rebutted, the right to foreclose will be barred.⁴

682. This, however, is a mere presumption of fact, and is not conclusive. It may therefore be rebutted by parol evidence.⁵ But the evidence must be very clear that the mortgagor has by some unequivocal act recognized the existence of the debt within the period of twenty years. The presumption may be rebutted by proof of payment, or of any admissions or other circumstances from which the court or jury would be authorized to find that the debt had been treated by the mortgagor as a subsisting debt.⁶

683. Although the debt to secure which a mortgage was given is barred by the statute of limitations, the period being six years, so that no action can be brought upon it thereafter, yet, if it has not in fact been paid, the mortgagee has

¹ *Crane v. March*, 4 Pick. 131; *Norton v. Palmer*, 142 Mass. 433; [Weston's Lessee *v.* Mowlin, 2 Burr. 969; *Johnson v. Hart*, 3 Johns. Cas. 322; *Southerin v. Mendum*, 5 N. H. 420; *Garrett v. Puckett*, 15 Ind. 485. See, also, *Aymar v. Bill*, 5 Johns. Ch. 570; *Jordan v. Sayre*, 29 Fla. 100.]

² [Page *v.* Pierce, 26 N. H. 317; *Moore v. Ware*, 38 Me. 497; *Todd v. Cremer*, 36 Neb. 480.]

³ *Young v. Miller*, 6 Gray, 152.

⁴ *Howland v. Shurtleff*, 2 Met. 26; *Chick v. Rollins*, 44 Me. 104; [Pitzer *v.* Burns, 7 W. Va. 63; *Richmond v. Aiken*, 25 Vt. 324; *Reynolds v. Green*, 10 Mich. 355; *Tripe v. Marcy*, 39 N. H. 439.]

⁵ [Philbrook *v.* Clark, 77 Me. 176.]

⁶ *Cheever v. Perley*, 11 Allen, 584; *Jarvis v. Albro*, 67 Me. 310; [Hughes *v.* Edwards, 9 Wheat. 489; *Giles v. Baremore*, 5 Johns. Ch. 545.]

his remedy upon the mortgage. If he sues upon that within twenty years, nothing but proof of actual payment of the debt will prevent his recovery.¹

In Massachusetts, when a mortgagor has been in possession twenty years, no payment having been made within that time, he may bring a petition to the Supreme Court to clear the title to the premises from the mortgage.²

684. EFFECT OF FORECLOSURE. — A foreclosure by the mortgagee vests the estate thereafter absolutely in him, and the mortgagor's equity of redemption is forever barred.³ Although the estate may be worth more than the amount of the debt, nevertheless, after foreclosure, it vests entirely in the mortgagee, and he is under no liability to account for any surplus in value to the mortgagor.⁴

685. If, however, the estate foreclosed does not equal in value the debt, upon proof of this the mortgagee may, in a suit brought for that purpose, recover the deficiency, *i. e.* the difference between the value of the estate and the amount of the debt. In other words, the estate foreclosed under the mortgage is only a payment *pro tanto* of the mortgagee's debt, and he is entitled to recover the balance still due, upon proof that the value of the estate did not equal the amount of his debt; provided that his action is not barred by the statute of limitations.⁵

¹ Ipswich Manufacturing Co. v. Story, 5 Met. 310, 312; Thayer v. Mann, 19 Pick. 535; Norton v. Palmer, 142 Mass. 433, 435; [Higgins v. Scott, 2 B. & Ad. 413; Belknap v. Gleason, 11 Conn. 160; Tucker v. Wells, 111 Mo. 399; Crooker v. Holmes, 65 Me. 195; Wiswell v. Baxter, 20 Wis. 680; Ohio Life Insurance Co. v. Winn, 4 Md. Ch. 253; Heyer v. Pruyn, 7 Paige, 465; Fisher v. Mossman, 11 Ohio St. 42. And this is so although there be no express covenant in the mortgage to pay the debt: Hulbert v. Clark, 128 N. Y. 295; Whipple v. Barnes, 21 Wis.

327. But in those Western States where the mortgage is regarded merely as a security for the debt, the barring of the debt will bar also a suit upon the mortgage: Harding v. Durand, 138 Ill. 515. See 2 Jones on Mortgages, § 1207.]

² Acts of 1882, ch. 237.

³ [So, where the mortgage was given in payment of an illegal note, it was held that, a foreclosure having been made, the title had passed absolutely: McLaughlin v. Cosgrove, 99 Mass. 4.]

⁴ [Hurd v. Colman, 42 Me. 182.]

⁵ [Hatch v. White, 2 Gall. 152; Amory v. Fairbanks, 3 Mass. 562;

686. In Massachusetts the effect of such a judgment in favor of the mortgagee is to reopen the foreclosure, and the mortgagor may redeem the mortgaged premises, provided he brings his suit to redeem within one year after the recovery of such judgment.¹ This is a barren remedy, except in case of some sudden rise in value of the estate.

The fact, however, that before the expiration of the three years the mortgagee has received from other security an amount less than the amount of the mortgage debt, does not of itself constitute a waiver of the foreclosure.²

Dunkley v. Van Buren, 3 Johns. Ch. 330 ; Lovell v. Leland, 3 Vt. 581 ; Vansant v. Allmon, 23 Ill. 30.] in Lovell v. Leland, 3 Vt. 581. *Contra*, Hatch v. White, 2 Gall. 152; Dunkley v. Van Buren, 3 Johns. Ch. 330.]

¹ Pub. Stats. ch. 181, § 42. [To the effect that such a suit opens the foreclosure at common law, see *dicta* ² *Tompson v. Tappan*, 139 Mass. 506.

CHAPTER XXV.

MORTGAGES (CONCLUDED).

687. **MORTGAGES WITH POWER OF SALE.** — We have now to consider a class of mortgages of comparatively modern creation, distinct in one very important particular from those already considered, namely, mortgages which contain a power in the mortgagee to sell the premises immediately upon breach of the condition. The sale being made, the mortgagee applies the proceeds to the payment of the debt and pays over the surplus, if there is any, to the mortgagor or to those who succeed to his rights.

Such a sale amounts to an absolute and complete foreclosure of the mortgage. No right of redemption thereafter exists.¹ This constitutes the distinguishing feature of power of sale mortgages and the great motive for resorting to them. There is no open question at this day as to the validity of such mortgages.² Both in England and in this country they are now recognized by statute, and in Massachusetts, as we shall have occasion to see later, some special provisions have been made in reference to them.

688. The first question which at present concerns us is, how, in the judgment of a court of equity, ought this power of sale to be exercised, and what rules have been formulated upon the subject.

The power of sale is usually to this effect: That, upon

¹ [Eaton v. Whiting, 3 Pick. 484; has. Carradine v. O'Connor, 21 Turner v. Johnson, 10 Ohio, 204. Ala. 573; Cormerais v. Genella, 22 Cal. 116. See, also, Brisbane v. Stoughton, 17 Ohio, 482.]

² [Very v. Russell, 65 N. H. 646; Durden v. Whetstone, 92 Ala. 480; 2 Jones on Mortgages, § 1765, and the cases *supra*.]

failure to pay the debt when it becomes due, the mortgagee shall have the right to sell the premises at public auction, giving certain notice in a newspaper, and to apply the proceeds of such sale to payment of the mortgage debt, handing over any surplus to the mortgagor or his assignees. The power of sale may or may not designate the place of sale, and it may or may not authorize the mortgagee to become a purchaser at the sale. In all cases it contains, or should contain, a power for the mortgagee to execute a proper deed of the premises to the purchaser at the public sale.

The legislation in Massachusetts bearing upon this matter is found in Public Statutes, ch. 181, § 17,¹ which provides that "no sale under and by virtue of a power of sale contained in a mortgage of real estate shall be valid and effectual to foreclose such mortgage unless, previous to such sale, notice thereof has been published once a week for three successive weeks in some newspaper, if there is any, published in the city or town wherein the mortgaged premises are situated, the first publication of such notice to be not less than twenty-one days before the day of sale."

It is therefore essential to the validity of any sale in Massachusetts, no matter what stipulations there may be in the mortgage excusing such notice, that the notice required by this statute shall have been given.² No agreement of parties can dispense with this express requirement of law made for the protection of the mortgagor.

689. Even a strictly literal compliance with this statutory provision, or with the terms of the power of sale, will not always satisfy a court of equity. If there has been any unfair dealing, or want of that good faith which is required of a mortgagee, a court of equity will set aside the sale as against

¹ [For the statutes of the various States on this matter, see 2 Jones on Mortgages, § 1723 *et seq.*]

² [This is the general rule. It has even been held that, where notice is required by statute to be given in a paper "printed" in the county, it is not sufficient that no-

tice be given in a paper published in the county but printed elsewhere: *Bragdon v. Hatch*, 77 Me. 433; *Hollis v. Hollis*, 84 Me. 96. See, also, *Bigler v. Waller*, 14 Wall. 297; *Thornburg v. Jones*, 36 Mo. 514; *New York Baptist Union v. Atwell*, 95 Mich. 239.]

the mortgagor although the statute has literally been complied with.

The rule which equity follows in this case is, that the mortgagee who undertakes to execute a power of sale is bound to the observance of good faith and of a suitable regard for the interest of his principal, the mortgagor, and, as has been said, he is subject to the rule which applies generally to trustees with power to sell.¹ "He cannot shelter himself under a bare, literal compliance with the conditions imposed by the terms of the power. He must use a reasonable degree of effort and diligence to secure and protect the interests of the party who intrusts him with the power. . . . When a party who is intrusted with a power to sell attempts also to become the purchaser, he will be held to the strictest good faith, and the utmost diligence for the protection of the rights of his principal."²

690. The consideration of a few cases in which these rules have been applied will perhaps be instructive.

A strict compliance with the statute and with the terms of the power in giving notice of the sale will not be sufficient where the just inference from the character of the notice is that neither the mortgagor nor the public had fair notice of the time and place of sale.

If the mortgage itself prescribes in what newspaper the notice shall be published, and at what place the sale shall occur, then the mortgagor has definite notice of these two particulars, and no complaint could ordinarily be made in respect to either of them. But very often, if not ordinarily, the power is silent as to these particulars, and the mortgagee is at liberty to select the newspaper in which notice is to be published, and also the place as well as the time of sale.³

If he selects some obscure or unusual place of sale, where buyers would not be apt to come, it is a fraudulent abuse of

¹ [Cassidy v. Cook, 99 Ill. 385; 369; Learned v. Foster, 117 Mass. Hoffman v. Anthony, 6 R. I. 282; 365; [Newman v. Ogden, 82 Wis. Jencks v. Alexander, 11 Paige, 53. See *infra*, p. 376.] 619; Longwirth v. Butler, 8 Ill. 32.] ³ [Singleton v. Scott, 11 Iowa, 589; Ingle v. Jones, 43 Iowa, 286.]

² Montague v. Dawes, 14 Allen,

his power sufficient to avoid the sale.¹ Such was the case in *Montague v. Dawes*, *supra*.

If he selected some obscure newspaper, or one not usually employed for such notices, it would probably have the same effect,² unless it appeared that the mortgagor had actual notice.³

691. SPECIAL NOTICE. — The mortgagor, and those standing in his place, are entitled to special notice of the sale when, by previous negotiations or dealings with the mortgagee, they are led to believe that they will have such notice.

The same is true where the mortgagee knows that the owner of the equity (the assignee of the mortgagor) designs to pay the mortgage debt, and would not allow the estate to be sold if he had notice of the intended sale. In *Drinan v. Nichols*⁴ the owner of the equity of redemption (assignee of the mortgagor) had paid the interest to an agent of the mortgagor, and supposed that this agent had paid it to the mortgagee. It had not been paid, but the mortgagee knew that it had been put in the agent's hands. The court held that under these circumstances the assignee was entitled to special notice before sale of the premises. This doctrine is not, however, to be stretched too far, and therefore the court, while admitting the full force of the cases just stated, say in *King v. Bronson*:⁵ "There appears to have been a literal compliance with the terms of the power, and the sale took place as advertised. This is sufficient to foreclose the mortgage, unless we can find from a full disclosure of all the facts underlying the formal proceedings, that the defendant has not acted in good faith, or has failed in some respect to properly protect the interests of the mortgagor."

Perhaps the rule may be stated thus: A literal compliance with the statute and with the terms of the power constitutes

¹ [See, also, *Holdsworth v. Shan-non*, 113 Mo. 508.]

² [*Webber v. Curtiss*, 104 Ill. 309.]

³ [*Webber v. Curtiss*, *supra*. But ordinarily he is not entitled to such

notice: *Dyer v. Shurtleff*, 112 Mass. 165; *Princeton Loan & Trust Co. v. Munson*, 60 Ill. 371.]

⁴ 115 Mass. 353.

⁵ 122 Mass. 122, 127.

primâ facie a good sale; but it is always competent to show from the nature of the publication, or from the time or place selected for the sale, or from the previous dealings of the parties, that good faith was not exercised in making the sale.

As a matter of practice, too much care cannot be used in executing this power, and special notice, as a proper precaution, ought to be given to the mortgagor in every case.

692. FORMALITIES OF NOTICE.¹—If the mortgagor has conveyed his estate since the mortgage, that does not concern the mortgagee. He is not bound to take notice, in his advertisement of sale, of any assignments or transfers made by the mortgagor subsequent to the mortgage.²

The power of sale, being a power coupled with an interest, is not revoked by the death of the mortgagor, and may be exercised as well after his death as before.³ Nor, for the same reason, is it revoked by the bankruptcy of the mortgagor.⁴

693. WHO MAY BUY. — It is clear that the mortgagee cannot buy, at a sale made by him under a power of sale, unless such right is reserved in the deed.⁵ And what he cannot do directly he cannot do indirectly. If, therefore, he employs some third person to purchase on his account, the proceeding is unlawful. The same rule applies in this case as in the case of an ordinary trustee.⁶

Such a sale is not absolutely void, but it is voidable at the

¹ [As to formalities of notice in the several States, see 2 Jones on Mortgages, § 1839.]

² Dyer v. Shurtleff, 112 Mass. 165; Learned v. Foster, 117 Mass. 365.

³ Varnum v. Meserve, 8 Allen, 158; Conners v. Holland, 113 Mass. 50; [Hunt v. Rousmanière, 8 Wheat. 174; Beatie v. Butler, 21 Mo. 313; Strother v. Law, 54 Ill. 413. See, also, Corder v. Morgan, 18 Ves. 344.]

⁴ Hall v. Bliss, 118 Mass. 554; Dixon v. Ewart, 3 Meriv. 322. [Nor by his insanity: Berry v. Skinner, 30 Md. 567.]

⁵ [Mapps v. Sharpe, 32 Ill. 13; Kornis v. Shaffer, 27 Md. 83; Hubbell v. Medbury, 53 N. Y. 98; Very v. Russell, 65 N. H. 646.]

⁶ Learned v. Foster, 117 Mass. 365; Dyer v. Shurtleff, 112 Mass. 165; [Davis v. Simpson, 5 Har. & J. 147; Waite v. Dennison, 51 Ill. 319; Parmenter v. Walker, 9 R. I. 225; Thornton v. Irwin, 43 Mo. 153. But, as in the case of an ordinary trustee, if there is a *bonâ fide* sale to a third person, the mortgagee may subsequently purchase from him: Munn v. Burges, 70 Ill. 604.]

election of the mortgagor, or of those having his rights, and that election must be exercised within a reasonable time.¹

In *Learned v. Foster*² the owner of the equity of redemption attempted to set aside the sale thirteen years afterwards, asserting that he had no notice of the sale, and was not aware that it had been made. The court held that he had at least been put upon inquiry by the fact that the mortgagee had been in possession, and that he himself had paid no interest during all that interval; that he was thus charged with notice, and with gross laches in not exercising his election before.³

694. If, however, by the terms of the power, the mortgagee is authorized to become the purchaser, he will be allowed to purchase, provided the sale is conducted by him in all respects with the utmost good faith, and with a due regard to the rights of the mortgagor.⁴

If he does thus act in good faith, particularly if he has given special notice of the sale to the mortgagor, the sale will not be set aside although the mortgagee was the only bidder, and although the estate brought less than its value.⁵ In such a case (of sale to himself) the mortgagee may make the deed by himself, under the power, directly to himself.⁶

695. If the mortgagee is a married woman, upon executing the power of sale she may make the deed to the purchaser in her own name, and it is not necessary to its validity that her husband should either join in the deed or give his written consent to it.⁷

696. In Massachusetts the Public Statutes⁸ provide that

¹ [*Hyndman v. Hyndman*, 19 Vt. 9; *Jenkins v. Pierce*, 98 Ill. 646; *Nichols v. Baxter*, 5 R. I. 491.]

² *Supra*.

³ [*Ezzell v. Watson*, 83 Ala. 120; *Landrum v. Union Bank*, 63 Mo. 48; *Norton v. Tharp*, 53 Mich. 146.]

⁴ *Hall v. Bliss*, 118 Mass. 554, and the cases *supra*; [*Gamble v. Caldwell*, 98 Ala. 577; *Elliott v. Wood*, 45 N. Y. 71; *Grover v. Fox*, 36 Mich. 461.]

⁵ *Learned v. Geer*, 139 Mass. 31; [*Robinson v. Amateur Association*, 14 S. C. 148; *Kennedy v. Dunn*, 58 Cal. 339; *Matthews v. Daniels*, 21 S. W. Rep. 469.]

⁶ *Hall v. Bliss*, *supra*; [*Woonsocket Institution for Savings v. American Worsted Co.* 13 R. I. 255; *Marsh v. Hubbard*, 50 Tex. 203.]

⁷ *Cranston v. Crane*, 97 Mass. 459.

⁸ Ch. 181, § 18.

the person selling (under a power of sale) shall, within thirty days thereafter, make and file in the registry of deeds an affidavit of the facts of sale, with a copy of the notice. It has been determined that the omission to do this does not affect the validity of the sale; that this is a provision for preserving the evidence of the sale, and is merely directory in its character, and was not intended to create a condition subsequent, a non-compliance with which would render the sale invalid.¹

697. A proper sale, as I have said, forecloses the mortgage, and no right of redemption thereafter remains. But to have this effect the sale must be consummated. A mortgagor, without previous tender, may bring a suit to redeem after notice of sale has been given, if the sale has not yet been made.²

A mortgagor may forfeit his right to redeem by delay in prosecuting the suit after bringing his bill.³

698. TACKING MORTGAGES. — The equitable doctrine of tacking, as it is called, consists in this: Where a creditor takes a third mortgage upon an estate without knowledge, at the time, of the second mortgage, if he subsequently acquires a title to the first mortgage he may tack the two together, and thus be entitled to payment not only of the first mortgage but also of his third mortgage, in preference to the second mortgagee. It was held not to impair this right if the third mortgagee knew, when he purchased the first mortgage, of the existence of the second mortgage.⁴

This doctrine is called, in the old cases and books, "the equitable doctrine of tacking," but there is no equity in it, and it was never recognized at common law. There is no justice in any theory or rule which allows a second mort-

¹ *Field v. Gooding*, 106 Mass. 310; *Learned v. Foster*, 117 Mass. 365.

² *Way v. Mullett*, 143 Mass. 49; *Clark v. Griffin*, 148 Mass. 540. It is provided, however, by statute (Acts of 1888, ch. 433), that in such a case the mortgagee may proceed with the sale, unless the mort-

gagor pays into court the amount due, or unless the court, for cause shown, enjoins the sale. [*Tripp v. Ide*, 3 R. I. 51.]

³ *Bancroft v. Sawin*, 143 Mass. 144. [See, further, *Cornell v. Newkirk*, 44 Ill. App. 487; s. c. 144 Ill. 241.]

⁴ 1 Story's Eq. 412.

gage to be suppressed by a third. The doctrine has no existence in this country, and the whole reason upon which it was maintained in England fails wherever there is a system of recording deeds.¹

The recording of a mortgage is constructive notice to all the world of its existence, and therefore all recorded mortgages take precedence according to the date of their record, irrespective of the date of their execution. If, therefore, one who has the first mortgage in point of fact fails to record it, a subsequent mortgagee who has no actual notice of the existence of the prior mortgage has the better right, and his mortgage will take priority of the other.²

Mortgages of Personal Chattels.

699. What constitutes such a mortgage in equity?

(a) It may be a mortgage in regular form; that is, a conveyance with a condition subsequent, in the same instrument, that the mortgage is to become void upon performance by the mortgagor of the condition named.³ A seal is unnecessary.⁴

(b) There may be an absolute conveyance in form, with a separate defeasance in writing given by the grantee (the mortgagee) to the effect that he will reconvey on payment of the debt.⁵

700. (c) Although the transfer is absolute in form, yet, if it was in fact given simply as a security for a debt, this in equity constitutes only a mortgage although there was no

¹ [Grant v. Bissett, 1 Caines' Cas. (N. Y.) 112; Chandler v. Dyer, 37 Vt. 345.]

² 1 Story's Eq. § 419, note.

³ [At common law, a valid mortgage of personal property may be made without writing, provided that there is such a delivery as will satisfy the statute of frauds: Bank of Rochester v. Jones, 4 N. Y. 497.]

⁴ Milton v. Mosher, 7 Met. 244; Sherman v. Fitch, 98 Mass. 59, 64; Gerrey v. White, 47 Me. 504; [Despatch Line v. Bellamy Manu- facturing Co. 12 N. H. 205, 234; Gibson v. Warden, 14 Wall. 244. The right to possession passes, as in the case of real estate, to the mortgagee: Jamieson v. Bruce, 6 Gill & J. 72.]

⁵ Winslow v. Tarbox, 18 Me. 132; Carpenter v. Snelling, 97 Mass. 452; Taber v. Hamlin, 97 Mass. 489; [Brown v. Sement, 8 Johns. 96; Polhemus v. Trainer, 30 Cal. 685; Davis v. Hubbard, 38 Ala. 185.]

written defeasance, and the fact may be proved by parol testimony.¹

701. The rule is otherwise at law; and a bill of sale, or other written transfer absolute in terms, cannot be shown by parol testimony to have been intended only as a security or mortgage, and not as an absolute transfer of title.²

702. But this rule, excluding parol proof in actions at law to show that a conveyance absolute in form was in fact a mortgage, is now confined in Massachusetts to cases where the title to the property is directly in issue; as, for example, where the vendor seeks to recover the property from his vendee on the ground that the transfer was only intended as a mortgage, and that the debt has since been paid. Such was the case in *Harper v. Ross*, *supra*. If, however, the question arises collaterally, it may be shown by parol evidence that the conveyance was intended only as a mortgage or security. In *Reeve v. Dennett*³ the plaintiff sued for money lent. The defendant asserted that there was no loan, but a payment for certain stocks which the defendant transferred to the plaintiff at the time by an instrument absolute in its terms. The plaintiff contended that the transfer was intended only as security for a loan; and the court held that he might show this by parol testimony.

703. At common law there was no equity of redemption under a personal mortgage, but upon breach of condition the title vested absolutely in the mortgagee, and no process of foreclosure was necessary.⁴

704. In Massachusetts both the mortgagor's right to redeem and the mortgagee's right to foreclose are provided for

¹ *Newton v. Fay*, 10 Allen, 505; 398; [*Bryant v. Crosby*, 36 Me. Brick v. Brick, 98 U. S. 514; [*Des-* 562.]

pard v. Walbridge, 15 N. Y. 374; National Insurance Co. v. Webster, 83 Ill. 470; *Hickman v. Cantrell*, 9 Yerg. 172; *Berond v. Lyons*, 85 Iowa, 482. *Contra*, except in case of fraud, *Farrell v. Bean*, 10 Md. 217.]

² *Harper v. Ross*, 10 Allen, 332; *Pennock v. McCormick*, 120 Mass. 275; *Philbrook v. Eaton*, 134 Mass.

³ 137 Mass. 315.

⁴ *Taber v. Hamlin*, 97 Mass. 489; *Burtis v. Bradford*, 122 Mass. 129; *Winchester v. Ball*, 54 Me. 558; [*Ackley v. Finch*, 7 Cowen, 290; *Flanders v. Thomas*, 12 Wis. 410; *Wood v. Dudley*, 8 Vt. 430; *Evans v. Merriken*, 8 Gill & J. 39; *Pyeatt v. Powell*, 51 Fed. Rep. 551.]

by statute.¹ The mortgagor may now redeem, after breach of condition, by paying or tendering the full amount due, "at any time" before the property is sold under the mortgage, or before the right of redemption is foreclosed by the mortgagee in the manner required by the statute.²

The mode of foreclosure in Massachusetts is as follows: After breach of condition the mortgagee must give written notice to the mortgagor, or to the person in possession of the property, of his intention to foreclose. This notice may be served personally, or by publication once a week for three successive weeks in a newspaper of the town where the mortgage is recorded, or where the property is situated. This notice, with an affidavit of its service, must be recorded where the mortgage is recorded. If the mortgagor does not pay or tender the amount due within sixty days after such notice is recorded, the right to redeem is forever foreclosed.³

If these steps have been followed, the title of the mortgagee becomes absolute and perfect upon the expiration of the sixty days, and a court of equity will not reopen the foreclosure upon any attempt of the mortgagor to prove that the value of the property was greatly in excess of the amount due under the mortgage.⁴

705. If the mortgagee refuses to allow the mortgagor to redeem in a proper case, the remedy of the latter is commonly at law only, by tendering the amount due, and, if this is refused, by bringing an action of replevin against the mortgagee, if the property be in his possession.⁵ It is held that the mortgagor must resort to this legal remedy, and that a bill in equity to redeem will not ordinarily lie.⁶

706. THERE ARE TWO EXCEPTIONS. — (1) Where the property mortgaged is not a tangible article subject to replevin, the mortgagor may have relief in equity. For exam-

¹ [It is so in the States commonly. See Jones on Chattel Mortgages, 129.] ⁴ *Burtis v. Bradford*, 122 Mass.

² Pub. Stats. ch. 192, §§ 5, 6. ⁵ Pub. Stats. ch. 192, § 6.

³ Pub. Stats. ch. 192, §§ 7, 8, 9, 22. ⁶ *Gordon v. Clapp*, 111 Mass.

amendment.

ple, when it is a patent, or an interest in a patent, or stocks, or other incorporeal right, the title to which resides necessarily in a written instrument, — in all such cases the mortgagor may go into equity to redeem, because, from the very nature of the property, he cannot reach it at law by an action of replevin.¹

(2) Where the mortgagor is entitled to an account from the mortgagee before he can ascertain the amount due, and thus know the proper amount to be tendered, if the mortgagee refuses to render such an account the mortgagor may bring his bill to redeem, offering to pay whatever may be found to be due.² Ordinarily a mortgagor is bound to know the amount due, but sometimes this amount depends upon an account kept by the mortgagee.

707. The mortgagee's remedy to foreclose is not, as a rule, in equity. He has only to give the notice required by the statute. This affords a very simple and adequate remedy. Upon this ground, in *Boston & Fairhaven Iron Works v. Montague*, *supra*, the court refused to entertain a bill to foreclose, and they intimated (at p. 251) that only under extraordinary circumstances could such a bill be entertained.

Such a case did arise in *Dillaway v. Butler*,³ where the court entertained a bill by a second mortgagee against the first mortgagee and the assignee (in insolvency) of the mortgagor. The plaintiff alleged that the first mortgage was void, but offered to pay whatever might be found due under it; and he also alleged that the assignee (in insolvency) had taken possession of and secreted the mortgaged property. The court held that this was a clear case for relief in equity.

708. THE STATUTE OF LIMITATIONS. — When is the right of the mortgagor to redeem and of the mortgagee to foreclose, respectively, barred? In Massachusetts there is no direct statute upon the subject, nor has the question been passed upon in any reported case. The Public Statutes⁴ provide that all actions upon contracts, and all actions of replevin,

¹ *Boston & Fairhaven Iron Works v. Montague*, 108 Mass. 248.

³ 135 Mass. 479.

⁴ Ch. 197, § 1.

² *Boston & Fairhaven Iron Works v. Montague*, *supra*.

and all other actions for taking or detaining goods or chattels, shall be brought within six years after the cause of action accrued.

If, therefore, a mortgagor duly tenders the amount due upon the mortgage and the mortgagee refuses to deliver the property, it would seem that the mortgagor's right to his suit of replevin is not barred until the expiration of six years from the time of such tender, because his right of action accrues when the tender is refused.

But the question remains, when — that is, how soon after the debt becomes due — must the mortgagor make his tender? I should say that, in analogy to other cases, he must do this within six years after the debt becomes payable.¹ The mortgagor's right to his writ of replevin is thus practically extended to twelve years after the debt becomes due.

709. When is the right of the mortgagee to foreclose barred? Here again, by analogy, it would seem that his right is gone if he has taken no steps to foreclose his mortgage for six years after the debt became due. When the debt became payable his right accrued both to the possession of the property and also to foreclosure by notice in the manner prescribed by the statute. Now if he has omitted to take either step for six years, his right to the property is gone, because no action will lie on his behalf to recover, either by replevin or otherwise, inasmuch as such an action would be barred by the lapse of six years.²

These views are confirmed by a recent decision in Massachusetts to the effect that six years' adverse possession of a chattel not only defeats the right of action of the owner to recover it, but actually transfers the title to the possessor, so that the former owner cannot justify his taking it after the six years have elapsed.³

¹ *Codman v. Rogers*, 10 Pick. 111; *Angell on Limitations*, § 96; 129; *Hope v. Johnston*, 28 Fla. [Perry v. Craig, 3 Mo. 516; Winchester v. Ball, 54 Me. 558; Lavigne v. Naramore, 52 Vt. 267.]

² [*Sullivan v. Hadley*, 16 Ark. 55.]

³ *Chapin v. Freeland*, 142 Mass. 383.

CHAPTER XXVI.

LIENS AND CREDITORS' BILLS.

710. **EQUITABLE LIENS.**—A lien at common law is a right to retain possession of an article until a debt due from the owner of the article to the creditor in possession is paid.¹ Thus, the vendor of a personal chattel has a right to retain it until the price is paid by the vendee, although the property in the thing has passed to the vendee.² A mechanic is entitled to retain the article upon which he has bestowed labor or material until he is paid therefor by the owner.³ A solicitor may retain the deeds and other papers of his client until his services are recompensed;⁴ and so a carrier may retain the thing carried, until the freight money is paid.⁵

711. This common-law lien has two characteristics: (1) It does not depend upon, *i. e.* it is not in the nature of, an express contract, but it arises in the case *ex æquo et bono*, as has been said. It is a right implied and created by law.⁶ (2) Possession of the article is absolutely essential to existence of the lien. If the creditor voluntarily parts with the possession of the article his lien is destroyed.⁷

712. An equitable lien arises whenever the owner of some

¹ *Hammonds v. Barclay*, 2 East, Term Rep. 227; *Peck v. Jenness*, 7 How. 612, 620; [*Ridgely v. Iglehart*, 3 Bland (Md.), 540.]

² [*White v. Welsh*, 38 Pa. St. 396; *Robinson v. Morgan*, 65 Vt. 37; *Clark v. Draper*, 19 N. H. 419.]

³ [*Jacobs v. Knapp*, 50 N. H. 71; *White v. Smith*, 44 N. J. L. 105; *Arians v. Brickley*, 65 Wis. 26.]

⁴ [*McPherson v. Cox*, 96 U. S. 404; *In re Knapp*, 85 N. Y. 284; *Howard v. Osceola*, 22 Wis. 453.]

⁵ [*Ames v. Palmer*, 42 Me. 197; *Bowman v. Hilton*, 11 Ohio, 303.]

⁶ [*Pinney v. Wells*, 10 Conn. 104; *Chambers v. Davidson*, L. R. 1 P. C. 296, 305.]

⁷ [See the cases just cited, and *Forth v. Simpson*, 13 Ad. & E. (N. S.) 680, 686; *Ex parte Foster*, 2 Story's R. 131; *Clemson v. Davidson*, 5 Binney, 392; *Fishell v. Morris*, 57 Conn. 547.]

particular property expressly agrees with a creditor that it shall stand as security for his debt.

This, also, has two characteristics, and they are just the reverse of those essential to the common-law lien: (1) An equitable lien can exist only by virtue of an express contract to that effect between the debtor and the creditor.¹ (2) Possession by the creditor is not essential to the lien. In fact, possession is inconsistent with an equitable lien; for on the moment that the creditor takes possession he becomes a pledgee in possession. The characteristic of an equitable lien is, that it gives the creditor a right to assert this claim for security against property not in his possession.² It is now perfectly well settled that a debtor may create an equitable lien in favor of a creditor by agreeing with him that certain designated property of the debtor shall stand as security for his debt.

713. This equitable lien may be created both in real³ and personal⁴ estate. If the agreement relates to real estate, then by the statute of frauds it must be in writing, for that statute requires that all contracts creating any interest in real estate shall be in writing;⁵ but if it relates to personal property, the contract may be verbal.

714. To constitute a good lien the agreement must refer to some specific property; a general, indefinite agreement to give the creditor security is not sufficient. But if the agreement is for security upon all the debtor's lands which he then holds, or upon all of his property of any other defined description, it is good, because the agreement refers to and includes specific property, although by a general designation.

In *Mornington v. Keane*⁶ the Lord Chancellor said: "Nor

¹ [Ketchum v. St. Louis, 101 U. S. 306; Jones on Liens, § 27. The contract must be clear: Cook v. Black, 54 Iowa, 693.]

² Jones on Liens, § 28. See, also, Gregory v. Morris, 96 U. S. 619.

³ [Pinch v. Anthony, 8 Allen, 536.]

⁴ Gregory v. Morris, 96 U. S.

619; Hauselt v. Harrison, 105 U. S. 401; [Hovey v. Elliott, 118 N. Y. 124.]

⁵ [Kelly v. Kelly, 54 Mich. 30; Chadwick v. Clapp, 69 Ill. 119; Pinch v. Anthony, 8 Allen, 536; Smith v. Smith, 125 N. Y. 224; Daggett v. Rankin, 31 Cal. 321.]

⁶ 2 De G. & J. 292, 313.

do I doubt that a covenant that particular lands shall be charged may of itself create a charge upon those lands, or (which is the same thing) that a covenant that all the lands which the covenantor shall have on a particular day shall stand charged will create a charge without more.”¹

If the drawer of a bill of exchange consigns goods to the acceptor under an agreement that the goods shall be security for his acceptances, this constitutes an equitable lien on or assignment of the goods, and equity will enforce and protect the acceptor's title thereto.² So, also, if the drawer of several bills of exchange has agreed with the several acceptors that a consignment made to A shall stand as their security, and that they shall be paid out of the proceeds of the sale of the consignment, this constitutes an equitable lien upon the goods in favor of the several acceptors, which equity will enforce.³

715. Another equitable lien, entirely distinct from that already considered as created by contract, arises where one has improperly applied the funds of another, which he holds in trust, in part payment of property the title of which he takes himself.

Where one furnishes (as we have seen already), in whole or in part, the funds with which an estate is purchased, and the title is taken in the name of another, a resulting trust arises in favor of the person furnishing the consideration, either for the whole or for such definite part of the estate as he may have paid for.

But the case now under consideration is of a different nature. It is where one holding specific funds for another, as agent or *quasi* trustee, misapplies them in the purchase or part purchase of an estate. Here equity charges the estate with an equitable lien in favor of the creditor, and will compel it to be applied, by a sale or otherwise, to indemnify the creditor.⁴

¹ [But see *Mundy v. Munson*, 40 J. 409; *Ranken v. Alfaro*, L. R. 5 Hun, 304.] Ch. D. 786.

² [*Michigan State Bank v. Gardner*, 15 Gray, 362.] ⁴ *Bresnihan v. Sheehan*, 125 Mass. 11; *Hopper v. Conyers*, L. R. 2 Eq. Cas. 549.

³ *Frith v. Forbes*, 4 De G., F. &

716. These equitable liens (of both kinds) are good not only as against the debtor and his heirs and executors, but also against subsequent purchasers with notice and creditors with notice.¹ They would not be good against attaching creditors unless the instruments creating them were duly recorded.²

717. A question was formerly raised whether an equitable lien continued in favor of the creditor, as against the debtor's assignee in bankruptcy, if the debtor became bankrupt before the creditor enforced his lien. It is now settled in the United States Supreme Court, by a series of decisions, that an assignee in bankruptcy takes the title of the debtor subject to all liens, equities, and incumbrances, whether created by operation of law, or by act of the bankrupt while the property was in the hands of the bankrupt; and therefore, where the debtor has created (without violation of the Bankruptcy Law) an equitable lien upon any of his property in favor of a creditor, this lien is not lost by the debtor's subsequent bankruptcy.³

718. AS TO THE REMEDY IN CASE OF EQUITABLE LIENS. — If the agreement is for a lien on personal property, the creditor may, if he can, assert his lien by taking possession of the property itself. This was done by the creditor in *Gregory v. Morris*⁴ and in *Hauselt v. Harrison*,⁵ and in each case replevin was brought against the creditor, but the action was defeated.

If the agreement relates to real estate, or if the personal estate is not accessible to the creditor, then, as his title (until possession) is purely an equitable one, his remedy is in equity; and a court of equity will establish his claim to the prop-

¹ 3 Pomeroy's Eq. § 1235; [*Hovey v. Elliot*, 118 N. Y. 124; *Fresno Canal v. Dunbar*, 80 Cal. 530; *Graves v. Coutant*, 31 N. J. Eq. 763.] 95 U. S. 764; *Stewart v. Platt*, 101 U. S. 731, 739; *Hauselt v. Harrison*, 105 U. S. 401, 406; [*Exchange Bank v. Stone*, 80 Ky. 109; *Talcott v. Dudley*, 5 Ill. 427; *In re Howe*, 1 Paige, 125.]

² [*Allen v. Loring*, 34 Iowa, 499; *Adams v. Buchanan*, 49 Mo. 64. See 3 Pomeroy's Eq. § 1253, note.] ⁴ 96 U. S. 619.

⁵ *Yeatman v. Savings Institution*, ⁵ 105 U. S. 401.

erty, whether the property be real or personal, and decree the necessary conveyance or transfer.¹

Creditors' Bills.

719. Whenever a creditor has obtained a judgment at law, and execution issued upon the judgment has been returned unsatisfied for want of property which can be seized at law, equity will assist the creditor to reach and apply to his debt any other property of the debtor not attachable at law; and this it does by what is called a creditor's bill. There is a vast variety of property that a debtor may have which from its nature cannot be taken on execution, as for instance the interest of a beneficiary in trust property; and chancery will assist the creditor to apply such property to the payment of his debt.²

720. The essential characteristics of this proceeding are as follows: The creditor (as a general rule) must first have obtained a judgment at law for his debt, and execution must have been issued thereon and returned unsatisfied, or the bill will not lie.³ The reason of this is, that a creditor must exhaust all his remedies at law before he has a right to the

¹ *Pinch v. Anthony*, 8 Allen, 536, *supra*; *Ranken v. Alfaro*, L. R. 5 Ch. D. 786, *supra*; [*Perry v. Board of Missions*, 102 N. Y. 99; *Vallette v. Whitewater Valley Canal Co.* 4 McLean, 192; *Lord v. Wilcox*, 99 Ind. 491.]

² *McDermutt v. Strong*, 4 Johns. Ch. 687; *Ager v. Murray*, 105 U. S. 126; [*Spelman v. Freedman*, 130 N. Y. 421; *Lewis v. Shainwald*, 48 Fed. Rep. 492; *Bank of Commerce v. Chambers*, 96 Mo. 459; and the cases *infra*. But if there be a plain, adequate, and complete remedy at law, as for instance if the creditor knew, when the bill was filed, of attachable goods belonging to the defendant, a creditor's bill will not lie, despite the fact that there is a return on the execution of "No goods:"]

Merchants' Bank v. Sabin, 34 Fed. Rep. 492. Nor will a bill lie if the claim be barred by the statute of limitations: *Paxton v. Rich*, 85 Va. 378.]

³ [*Baxter v. Moses*, 77 Me. 465; *Adsit v. Butler*, 87 N. Y. 585; *McKeldin v. Gouldy*, 91 Tenn. 677; *Alhauser v. Doud*, 74 Wis. 400; *Durand v. Gray*, 129 Ill. 9; *Cleveland Co. v. Joliet, &c. Co.* 53 Fed. Rep. 683. It is not sufficient that the execution be returned unsatisfied. It must appear that there was no property subject to levy: *Buckeye Engine Co. v. Donau Brewing Co.* 47 Fed. Rep. 6. A return of *nulla bona*, made on the day that the execution issued, is sufficient: *Young v. Clapp*, 40 Ill. App. 312.]

aid of a court of equity, and it does not appear that the aid of a court of equity is necessary unless proceedings at law have failed to obtain payment.¹

721. It has even been held that a foreign judgment at law, *i. e.* a judgment recovered in some other State or country, will not support a creditor's bill, but that the judgment must have been recovered in the same State in which the bill is filed.² It was so held in *Clafin v. McDermott*.³ In that case the plaintiff had recovered judgment in California, and subsequently he brought a creditor's bill in the Southern District of New York, and it was held that judgment should first have been obtained in New York.

In *Wilkinson v. Yale*⁴ a judgment in the state court was held sufficient, the bill being brought in the United States Circuit Court in the same State.

In *Etna National Bank v. Manhattan Life Insurance Co.*⁵ a judgment in the United States Circuit Court for the District of Florida was held sufficient, under the circumstances, to support a bill in the Southern District of New York, the plaintiff being the same in both suits.

Where the property to be reached is in some State other than that of the debtor, and consequently no second judgment at law can be recovered against him, it would amount to a denial of justice if a court of equity should refuse relief against the property within its jurisdiction, merely because the creditor had not performed the impossible act of obtaining a second judgment at law against the debtor.

722. The rule requiring a preliminary judgment at law,

¹ *Smith v. Railroad Co.* 99 U. S. 398, 401; *Carver v. Peck*, 131 Mass. 291; *Brinkerhoff v. Brown*, 4 Johns. Ch. 671.

² [*National Tube Works v. Ballou*, 146 U. S. 517; *Buchanan v. Marsh*, 17 Iowa, 494; *Crim v. Walker*, 79 Mo. 335; *Globe Rolling Mills Co. v. Ballou*, 42 Fed. Rep. 749; *Winslow v. Leland*, 128 Ill. 304.]

³ 20 Blatchf. 522.

⁴ 6 McLean, 16. [But it has been held that a judgment obtained in the Circuit Court of the United States, in the same district as the state court concerned, is not sufficient: *Tarbell v. Griggs*, 3 Paige Ch. 207; *Winslow v. Leland*, 128 Ill. 304. *Contra*, *Brown v. Bates*, 10 Ala. 432.]

⁵ 24 Fed. Rep. 769. See, also, *Robert v. Hodges*, 16 N. J. Eq. 299.

and execution returned unsatisfied, is not inflexible. It has at least one exception: When it appears by the bill that the debtor is insolvent, and therefore a judgment against him and execution at law would be of no practical utility, they are not necessary to equitable interference.

The court well say in *Case v. Beauregard*¹ that "judgment and fruitless execution are only evidence that his [the creditor's] legal remedies have been exhausted, or that he is without remedy at law. They are not the only possible means of proof. The necessity of resort to a court of equity may be made otherwise to appear."

In that case no judgment at law had been recovered, but the bill alleged the insolvency of the defendants, and therefore the inutility of such a proceeding.

The court said: "Whenever a creditor has a trust in his favor, or a lien upon property for the debt due him, he may go into equity without exhausting legal processes or remedies" (page 691).²

723. A bill of this nature may be brought by a judgment creditor for his sole benefit, and not for the benefit of other creditors, and by filing his bill he establishes a prior lien in his own favor upon the property in question.³

¹ 101 U. S. 688, 690. [Where a corporation had been dissolved and the assets distributed, it was held that a judgment against it might be dispensed with: *Pullman v. Stebbins*, 51 Fed. Rep. 10. See, also, *National Tradesmen's Bank v. Wetmore*, 124 N. Y. 241. To the effect that a judgment is necessary, although execution may be dispensed with, see *Ginn v. Brown*, 14 R. I. 524. To the effect that an execution is unnecessary, see *Turner v. Adams*, 46 Mo. 95; *Creagan v. Howes*, 3 Iowa, 365; *Tabb v. Williams*, 4 Jones Eq. (N. C.) 352. See, further, 3 Pomeroy's Eq. § 1415 and note.]

² [Wiggin v. Heywood, 118 Mass. 514; *Case v. Beauregard*, 101 U. S.

688; *Holt v. Bancroft*, 30 Ala. 193; *Tappan v. Evans*, 11 N. H. 311; *Orton v. Madden*, 75 Ga. 83; *Consolidated Co. v. Kansas Co.* 45 Fed. Rep. 7. So, where an attaching creditor acquires a lien on property by virtue of his attachment, he may come into equity: *Francis v. Lawrence*, 48 N. J. Eq. 508. Where a debtor has fraudulently assigned all his property, a judgment at law against him would be useless, and the creditor may go into equity at once to set aside the assignment: *Talley v. Curtain*, 54 Fed. Rep. 43. As to whether a judgment creditor has a lien on land, see *Gilbert v. Stockman*, 81 Wis. 602.]

³ *Freedman's Savings Co. v. Earle*, 110 U. S. 710; *Marsh v.*

If the creditor chooses to bring the bill not only in his own behalf but in behalf of all other creditors who may elect to come in, he then voluntarily makes all such as do come in joint plaintiffs with himself, and entitled to share *pro rata* in the fund.¹

724. PROPERTY REACHED BY CREDITOR'S BILL. — The remaining inquiry is, what property can be reached and applied on a creditor's bill. The answer is, every vested right or equity of the debtor in any property, real or personal, which from its nature cannot be taken on execution, and which is not specially exempted by statute from the payment of debts.²

Creditors' bills have been sustained in numerous instances, a few of which I shall state by way of illustration: The equitable interest of the *cestui que trust*, where real or personal property is held by another for his benefit, may thus be reached.³

And so of the equitable lien or interest which one has in property which has been purchased by another, in whole or in part, by a misappropriation of his funds. Such was the case in *Bresnihan v. Sheehan*.⁴

So where a debtor has transferred his property to a

Burroughs, 1 Wood's R. 463, 467; McDermutt v. Strong, 4 Johns. Ch. 687. [But see p. 146, *supra*; Bartlett v. Drew, 57 N. Y. 587; Hallorn v. Trum, 125 Ill. 247; United States Bank v. Burke, 4 Blackf. 141; Neal v. Foster, 36 Fed. Rep. 29; Russell v. Chicago Savings Bank 139 Ill. 538; Gordon v. Lowell, 21 Me. 251.]

¹ Johnson v. Waters, 111 U. S. 640, 673-674; [Edmeston v. Lyde, 1 Paige, 637; Belmont Nail Co. v. Columbia Co. 46 Fed. Rep. 336; George v. St. Louis Co. 44 Fed. Rep. 117; Johnston v. Markle Paper Co. 153 Pa. St. 189.]

² [Watkins v. Dorsett, 1 Bland, 530. So where the creditor desires a discovery, not knowing what assets

the debtor has, or where they are: Cadwallader v. Granville Society, 11 Ohio, 292; Gordon v. Lowell, 21 Me. 251; Bay State Iron Co. v. Goodall, 39 N. H. 223; Thomas v. Adams, 30 Ill. 37.]

³ Forbes v. Lothrop, 137 Mass. 523; Sparhawk v. Cloon, 125 Mass. 263, and cases cited; Daniels v. Eldredge, 125 Mass. 356; [Graff v. Bonnett, 31 N. Y. 9; Halsted v. Davison, 10 N. J. Eq. 290; Montgomery v. McGee, 7 Humph. 234; Harris v. Alcock, 10 G. & J. 226. So a creditor may maintain a bill to have a deed from the debtor, which is absolute on its face, declared a mortgage: Macaulay v. Smith, 132 N. Y. 524.]

⁴ 125 Mass. 11, *supra*.

trustee, in order to defeat and defraud his creditors, the bill will lie against the trustee to reach and apply the property.¹

725. In Massachusetts the statutes provide that a creditor may attach and levy his execution directly upon such property notwithstanding the fraudulent transfer,² and it has been held that a bill in equity will not lie in such a case, inasmuch as the creditor has a plain and adequate remedy at law.³ But full jurisdiction in equity is now given to the Supreme Court in Massachusetts by Public Statutes, ch. 151, § 3; and it is settled that by virtue of this statute the jurisdiction in these cases is now concurrent, existing both at law and in equity.⁴

It is clear that the remedy in equity is much more appropriate and complete, because a single suit against the debtor and the alleged fraudulent grantee determines the whole controversy. Whereas, if the creditor sues the debtor at law, recovers, and levies execution upon his estate, he must, in another suit between himself and the grantee, contest the validity of the grantee's title.⁵

726. Whenever the owner of property has conveyed it on a valid trust, but the purposes of the trust do not exhaust the property, his equitable interest in the remainder by way of resulting trust may thus be reached.⁶

727. Other forms of property which may be reached by a creditor's bill are: (1) The interest of the pledgor of stocks or other property over and above the amount of the debt for which they are pledged, where there is no statute provision by which this interest can be taken at common law; (2) The separate property of the wife in the possession of her husband, as where he has in his hands the proceeds of her

¹ *Spader v. Davis*, 5 Johns. Ch. 280; s. c. 20 Johns. 554; [Everett v. Raby, 104 N. C. 479. See, also, *Dornueil v. Ward*, 108 Ill. 216; *Chamberlin v. Jones*, 114 Ind. 458; *Tantum v. Green*, 21 N. J. Eq. 364.]

² Public Stats. ch. 172, § 1; ch. 161, § 66.

³ *Mill River, &c., Association v. Clafin*, 9 Allen, 101.

⁴ *Weil v. Raymond*, 142 Mass. 206, 214; *Powers v. Raymond*, 137 Mass. 483.

⁵ [See *supra*, p. 293.]

⁶ [*McDermutt v. Strong*, 4 Johns. Ch. 687.]

real estate;¹ (3) Property of which the debtor has the legal title, and constructively the possession, but which from its nature cannot be seized and sold on execution, as, for example, letters patent or copyrights owned by the debtor.² (4) Shares in a corporation, where there is no statute provision (as there is in Massachusetts) for seizing them on execution;³ (5) Promissory notes of third persons, belonging to the debtor;⁴ (6) By parity of reasoning, the interest of a mortgagee, even before foreclosure;⁵ (7) The interest, *i. e.* the equity of redemption, of a mortgagor, wherever that interest is not made attachable by statute;⁶ (8) The debtor's interest in any agreement under which future royalties or payments are to accrue and become payable to him;⁷ (9) A

¹ Robinson v. Trofitter, 109 Mass. 478.

² Ager v. Murray, 105 U. S. 126; [Pacific Bank v. Robinson, 57 Cal. 520; Gillette v. Bate, 86 N. Y. 87; Wilson v. Martin-Wilson Fire-Alarm Co. 151 Mass. 515; Vail v. Hammond, 60 Conn. 374.]

³ Ager v. Murry, *supra*, p. 129.

⁴ Silloway v. Columbia Insurance Co. 8 Gray, 199.

⁵ Moody v. Gay, 15 Gray, 457.

⁶ [Rose v. Bevan, 10 Md. 466.]

⁷ Lord v. Harte, 118 Mass. 271. [The interest of an heir after the death of his ancestor may be reached by such a bill: Farrar v. Haselden, 9 Rich. Eq. 331; Craig v. Hone, 2 Edw. Ch. 554; Earle v. Grove, 92 Mich. 285. So of a debt owing to the debtor by a third person: Edmeston v. Lyde, 1 Paige, 637; Thompson v. Nixon, 3 Edw. Ch. 457. So of one partner's interest, where the partnership funds are in the hands of a receiver: Gooding v. King, 30 Ill. App. 169. So of an interest in a life insurance policy before the death of the insured: Stokes v. Amerman, 121 N. Y. 337. Under the New York Code, which

provides that choses in action may be reached by creditor's bill, the widow's right to dower in the land of her deceased husband may thus be reached before it has been assigned: Payne v. Becker, 87 N. Y. 153. But property exempt from attachment cannot be reached by creditor's bill: Tillotson v. Wolcott, 48 N. Y. 188; Venable v. Rickenberg, 152 Mass. 64; Geer v. Horton, 159 Mass. 259. Nor can a right of action for injury to property exempt from attachment be reached by a creditor's bill; but it is otherwise where property not exempt has been injured so as to be diminished in value: Hudson v. Plets, 11 Paige, 180. A mere possibility, such as an heir's expectant interest in the estate of his ancestor, or a salary yet to be earned, cannot be reached by a creditor's bill: Smith v. Kearney, 2 Barb. Ch. 533; Browning v. Bettis, 8 Paige, 568. Nor can the right to an action for a personal tort, such as slander, assault and battery, &c.: Hudson v. Plets, *supra*. A debtor's license to sell liquor, which by law is not assignable, cannot be

contract by publishers with an author to pay a certain sum semi-annually for each book sold by them.¹

Where a creditor's bill was brought against a foreign corporation and its directors, and the liability of the defendants depended upon the law of the foreign state, the bill was dismissed.²

728. SPECIAL CREDITOR'S BILL IN MASSACHUSETTS. — By Statutes of 1851 (ch. 206), jurisdiction was given to the Supreme Judicial Court in Equity upon a bill brought by a creditor against a non-resident debtor to reach and apply in payment of his debt any property, right, title, or interest of such debtor within the Commonwealth which could not be taken or attached in a suit at law. By General Statutes (ch. 113, § 2), and by Public Statutes (ch. 151, § 2, clause 11), this provision is extended to all debtors, whether non-resident or not.

These provisions, taken together, create a special creditor's bill, different in some important particulars from that which we have been considering, and which a court of chancery, *ex suo vigore*, provides for creditors.

Under the general equity jurisdiction now conferred upon the Supreme Judicial Court of Massachusetts,³ that court undoubtedly has the ordinary jurisdiction to entertain a creditor's bill whenever the special creditor's bill does not meet the case. In *Carver v. Peck*⁴ it was taken for granted by the court that under proper circumstances the court could and would entertain the ordinary creditor's bill.

729. The differences between the statutory bill and the chancery bill proper to be noted are as follows: Under the

reached by creditor's bill: *Koehler v. Olsen*, 68 Hun, 63.]

¹ An anomalous case is that of *Wiggin v. Heywood*, 118 Mass. 514, where land subject to a mortgage was attached on mesne process. Before judgment, it was sold by the mortgagee under a power of sale, a surplus being left after the mortgage debt was satisfied. It was held that the attaching creditor might reach this surplus by a bill in equity.

² *New Haven Horse-Nail Co. v. Linden Spring Co.* 142 Mass. 349. [The statutes which now exist in most of the States permitting the attachment of property by the trustee process, so called, have diminished the necessity for creditors' bills: *Venable v. Rickenberg*, 152 Mass. 64.]

³ Public Stats. ch. 151, § 4.

⁴ 131 Mass. 291.

Massachusetts statute, no previous judgment or execution at law is necessary ; the creditor may file the bill at once and on his own behalf, to reach and apply the debtor's property. This was settled in *Silloway v. Columbia Insurance Company*,¹ the first case in which the statute was ever brought to the notice of the court. And this constitutes its chief peculiarity.

The court has also held, first, that the statute does not apply to property in the personal possession of the debtor, but only to property held for him by some third person.² And, secondly, the court has held that, inasmuch as the statute relates to some property, right, title, or interest of the debtor, "within this State," it does not cover a patent owned by the debtor, on the ground that a patent cannot be said to be within the State.³

It is not surprising that these two decisions should have excited some comment, and they have been corrected by the Statute of 1884, ch. 285, § 1, which provides that the bill shall lie although the property sought to be reached is held by the debtor himself, independently of any other person, and although the property be not within the State.

730. In Massachusetts, then, there are two remedies in equity for the creditor : (1) A creditor's bill as administered by courts of equity, irrespective of any statute ; and (2) The creditor's bill created by the statutes already specified. Under these statutes no previous judgment or execution at law is necessary, and the bill lies when the property is in the possession of the debtor as well as when it is in the possession of third persons for him ; and it also lies against the debtor although the property itself is not within the State.

If the property is in the personal possession of the defendant, or is out of the Commonwealth, the only mode in which it can be reached is by a decree against the defendant personally, requiring him to execute and deliver to the creditor a proper transfer of the property itself, such as an assign-

¹ 8 Gray, 199.

² *Carver v. Peck*, 131 Mass. 291.

³ *Phoenix Insurance Co. v. Abbott*, 127 Mass. 558.

ment of a patent or a mortgage, or a conveyance of an equitable interest in real estate.

The bringing of such a bill in equity does not constitute a lien or attachment under Public Statutes, ch. 157, § 47.¹

¹ Powers v. Raymond, 137 Mass. 483; Squire v. Lincoln, 137 Mass. 399. [Nor does it prevent the debt- or's interest from passing to his assignee in insolvency: Titcomb v. Bradlee, 159 Mass. 190.]

CHAPTER XXVII.

SPECIFIC PERFORMANCE OF CONTRACTS.

731. UP to this point I have treated of jurisdiction in equity, so far as it depends upon the nature of the subject-matter involved in the suit. We have now to consider that jurisdiction so far as it depends upon the three great equitable remedies, — specific performance, injunction, discovery.

The only remedy which the common law can give where a party refuses to perform his contract is to award damages for the breach to the injured party, although in many cases this relief is inadequate. On the other hand, it is one of the great distinctions of equity that it can compel a refractory party to do precisely what he has agreed to do, — specifically to perform his contract ; or it can place the parties in the same position as if the contract had actually been performed.

All contracts may, with sufficient accuracy for our present purpose, be divided into six classes, namely: (1) Contracts for the sale of property ; (2) contracts for some personal service ; (3) contracts of partnership ; (4) contracts to insure ; (5) contracts for the payment of money ; (6) contracts to marry.

732. The fifth and sixth classes of contracts may at once be eliminated from our discussion. A court of equity will not take jurisdiction to enforce a contract simply for the payment of money, because the remedy in such a case is plain, adequate, and complete at law. A court of equity could do no more than a court of law, namely, give a decree for the amount due ; and therefore it will not entertain a suit for the performance of a contract for the mere payment of money.

Nor will a court of equity entertain a bill to compel either party to perform a contract of marriage. Equity has never assumed the responsibility of compelling an unwilling per-

son to enter the marriage relation ; it leaves the injured party to such solace and redress as a jury may give in the way of damages.

I now take up (1) contracts for the sale of property or of some interest therein. These again are divided into contracts relating to real property, and contracts relating to personal property.

Contracts for the Sale of Real Property.

733. The foundation of jurisdiction in equity to enforce the specific performance of agreements is, that the acquisition of the particular thing contracted for was the motive and object of the bargain, and therefore that nothing less than the acquisition of that particular thing will effectuate the object of the party, or do him complete justice. It is for this reason that equity will not leave him to his remedy at law for the recovery of damages merely, but will compel the other party to carry out the contract by a transfer of the thing agreed to be sold.¹

734. In all agreements for the purchase of real estate the presumption is that the acquisition of the particular property bargained for was the purpose of the agreement, and therefore a court of equity will take jurisdiction of all agreements for the sale of real estate, and will never decline jurisdiction on the ground that the injured person has an adequate remedy at law.²

735. As the statute of frauds declares that all agreements for the sale of real estate must be in writing, equity will not enforce an oral contract for the sale of land, unless there has been such part performance of it as will take the case out of the statute of frauds.³

Let us consider the rule which requires a writing, before treating of the exception depending on part performance.

¹ [So an agreement to lease a railroad bridge, although it be for a long term, as 999 years, will be enforced : *Union Pacific Railway Co. v. Chicago, R. I. &c. Co.* 51 Fed. Rep. 309.]

² [See *supra*, p. 31 *et seq.*]

³ It is not within my province to consider in much detail the requirements of the statute of frauds. The subject here touched upon is treated in *Browne on the Statute of Frauds*, chs. 17 & 18 ; *Fry on Specific Performance*, § 486.

First, then, there must be a sufficient memorandum in writing, signed by the party to be charged.¹ It must clearly show who is the buyer, who is the seller, the price to be paid, and the property to be conveyed.²

The names of the parties must appear in the writing, for the name of neither party can be supplied by oral proof; and the writing must show which is purchaser and which seller.³

736. The price must either be stated in the contract, or the means of ascertaining it must be furnished by the contract itself.⁴ If, for instance, the price is to be so much per acre, and the quantity is to be ascertained by a survey, this is sufficient; for that is certain which can be rendered certain. So it is settled that, where the agreement provides that the price shall be fixed by certain arbitrators named, this is sufficient, provided the arbitrators act. If they decline, or for any other reason fail to act, the agreement becomes void, because the price is left undetermined.⁵

Some English cases hold that when the bargain is for the

¹ [So the memorandum must have been delivered to the plaintiff, or to some one for him. A deed defective by reason of non-delivery may not be used as a memorandum to show the contract: *Parker v. Parker*, 1 Gray, 409; *Day v. Lacasse*, 85 Me. 242.]

² [*Sheid v. Stamps*, 2 Sneed (Tenn.), 172; *Nichols v. Johnson*, 10 Conn. 192; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 273; *Smith v. Shell*, 82 Mo. 215; *Farwell v. Lowther*, 18 Ill. 252.]

³ *Jarrett v. Hunter*, L. R. 34 Ch. D. 182; *Lincoln v. Erie Preserving Co.* 132 Mass. 129; [*Potter v. Duffield*, L. R. 18 Eq. 4; *Coombs v. Wilkes* [1891], 3 Ch. 77; *Grafton v. Cummings*, 99 U. S. 100, discrediting *Salmon Falls Manufacturing Co. v. Goddard*, 14 How. 446; *Sherburne v. Shaw*, 1 N. H. 157.]

⁴ [*Bromley v. Jefferies*, 2 Ver-

non, 415. But see *Hayes v. Jackson*, 159 Mass. 451, where the court held that, under the Massachusetts statute, the consideration need not be expressed in writing, although the sale is executory. The fixing of a price at as much as the grantor "might be able to obtain from other parties" is too indefinite to support a bill for specific performance. *Gelston v. Sigmund*, 27 Md. 334.]

⁵ [*Gourlay v. Duke of Somerset*, 19 Ves. 429; *Milnes v. Gery*, 14 Ves. 400; *Griffith v. Bank*, 6 Gill & J. 424, 440; *Hopkins v. Gilman*, 22 Wis. 476. An agreement to submit a controversy to arbitration cannot be enforced: *Tobey v. Bristol*, 3 Story's R. 800; *Noyes v. Marsh*, 123 Mass. 286. But if the arbitrators have acted, their award may be enforced in equity: *Story v. Norwich, &c. Railroad*, 24 Conn. 94.]

purchase or sale of goods on reasonable terms, or when no agreement whatever as to price is made, the omission to name the price in the memorandum is not fatal, if the memorandum is complete in other respects, because the law will imply that the price is to be a reasonable one. But whenever a price has been agreed upon, its omission is fatal to the memorandum. The cases are reviewed and the result is stated in Benjamin on Sales, §§ 247-249. These were all suits at law. There is no case, I think, where equity has enforced performance of a contract, real or personal, in which the price was not included in the memorandum.

737. SUBJECT-MATTER. — Questions under this statute most frequently arise in reference to the subject-matter, *i. e.* as to what precise property is the subject of the sale, and as to special terms of sale. The description of the property must be clear and definite, so that there shall be no uncertainty or ambiguity whatever in identifying it.¹ Parol evidence is never admissible to supply a want in the sufficiency of the description.² It is competent to identify the property, and indeed in most if not in all cases, resort must be had to parol evidence to identify the particular property which is thus fully described.³

Thus, where the agreement was for the sale of "Mr. Ogilvie's house," it was held that parol evidence was competent to identify the Ogilvie house.⁴

¹ [Brix v. Ott, 101 Ill. 70; Busey v. McCurley, 61 Md. 436; Ross v. Baker, 72 Pa. St. 186; Webster v. Clark, 60 N. H. 36; Sherer v. Trowbridge, 135 Mass. 500; Bishop v. Fletcher, 48 Mich. 555; Pipkin v. James, 1 Humph. 325. An agreement to lease is not valid unless it states when the lease is to begin, for there is no presumption that it begins at the date of the contract: Marshall v. Berridge, L. R. 19 Ch. D. 233. And so of an agreement which fails to state the duration of the lease: Myers v. Forbes, 24 Md. 598. "The whole property from cellar to top" is an insufficient designation, it not appearing whether the conveyance was to be for life, for a term of years, or in fee simple: Farwell v. Mather, 10 Allen, 322.]

² [Taney v. Bachtell, 9 Gill, 205; Murdock v. Anderson, 4 Jones Eq. (N. C.) 77.]

³ [McMurray v. Spicer, L. R. 5 Eq. 527; Ferguson v. Staver, 33 Pa. St. 411; Tallman v. Franklin, 14 N. Y. 584; Springer v. Kleinsorge, 83 Mo. 152.]

⁴ Ogilvie v. Foljambe, 3 Meriv. 53.

So, where an estate has acquired, or is known by, some arbitrary name, an agreement referring to the estate by that name would be sufficient, and parol evidence would always be competent to show what particular house or estate was intended. For example, the "Old State House," or the "Old South Meeting-House," in Boston, or, as was decided in *Haywood v. Cope*,¹ "the Bank End Estate," are sufficient descriptions.

It has long been settled that an agreement to sell "my house and lot" in a certain street or in a certain town, if it appear that the vendor was the owner of only one such house and lot, is sufficient. If he owned several such estates, then the description would clearly be insufficient, because the agreement does not determine which of the several houses was meant.

738. The case of *Hurley v. Brown*² extended this doctrine to an agreement for the sale of "a house on Amity Street, Lynn, Mass." It appeared that the defendant owned a house (and only one) on the street named. The court held that the legal presumption from such a contract must be that the party refers to a house which he owns and has a right to convey, and that with the aid of this presumption the description was equivalent to "my house on Amity Street," and so that the case was brought within those authorities which hold that the language "my house" is a sufficient description.³

In *Mead v. Parker*⁴ a majority of the court carried this doctrine still further. The memorandum was dated at *Boston*, and read: "This is to certify that I, J. P., have sold to F. M. a house on Church Street for the sum of fifty-five hundred dollars," etc. The defendant owned no house on Church Street in Boston, but he did own one on that street in Somerville, and the court held that parol evidence was competent to identify that as the house designated. Where, however, the description in the memorandum was merely "a piece

¹ 25 Beav. 140.

² 98 Mass. 545.

³ These cases are cited in the opinion. A similar description was

held sufficient in *Scanlan v. Geddes*, 112 Mass. 15. [*Contra*, *Holmes v.*

Evans, 48 Miss. 247.]

⁴ 115 Mass. 413.

of land I have sold her before witness," it appearing that this was a part of seventeen acres owned by the defendant, and there was no further description in the writing to identify the quantity or the particular portion meant to be sold, the memorandum was held insufficient, although parol evidence was offered to show that the parties had agreed upon and had staked out the lot intended to be sold.¹ The court held that parol evidence of this previous oral agreement could not be taken into consideration in order to make the written agreement complete.

739. The FORM OF THE AGREEMENT is not important. It may be embodied in one instrument, or two or more writings may be resorted to in order to make it out, provided these writings refer to one another so that they constitute in legal effect one instrument.² Thus the mere acceptance in writing of an offer to sell made in a letter, if the terms are definitely stated in the letter, is a sufficient agreement within the statute.³

740. Under an agreement to convey real estate, the law implies, in the absence of any contrary stipulation, that a good title in fee simple is to be conveyed, and therefore an agreement for the sale of real estate is not incomplete because it omits to state the nature of the title to be conveyed.⁴

741. Another important point to be considered is whether

¹ *Whelan v. Sullivan*, 102 Mass. 204; *Taylor v. Portington*, 7 De G., M. & G. 328; *Preston v. Preston*, 95 U. S. 200. In *Cheney Bigelow Wire Works v. Sorrell*, 142 Mass. 442, the court held that an order in these words, "Please send us pice of counter screen like draft," accompanied by the "draft," presented a case of "incurable uncertainty."

² [*Nene Valley Commissioners v. Dunkley*, L. R. 4 Ch. D. 1; *Wiley v. Robert*, 27 Mo. 388; *Ide v. Stanton*, 15 Vt. 685. When one paper refers to another paper, parol evidence is admissible to identify the paper thus referred to: *Baumann v.*

James, L. R. 3 Ch. App. 508. For the extent of this rule, see *Oliver v. Hunting*, L. R. 44 Ch. D. 205. But, of course, if no such reference be made, parol evidence is inadmissible to connect two separate papers: *Morton v. Dean*, 13 Met. 385; *Blair v. Snodgrass*, 1 Sneed, 1; *O'Donnell v. Leeman*, 43 Me. 158; *Frank v. Miller*, 38 Md. 450.]

³ *Fry on Specific Performance*, § 487, and the cases cited in the note; [*Allen v. Bennett*, 3 Taunton, 169; *Peck v. Vandermark*, 99 N. Y. 29.]

⁴ *Hughes v. Parker*, 8 M. & W. 244; *Hurley v. Brown*, 98 Mass. 545, 549.

the writing in question amounts to a definite agreement, or is a mere preliminary offer or proposition for a sale or purchase the exact terms of which are subsequently to be agreed upon by the parties. The true rule to be extracted from all the cases is, I think, as follows: If the agreement states all the terms of the bargain, and merely contemplates that a more formal instrument shall be drawn up embodying the same terms, a court of equity will hold the agreement to be valid and sufficient, and will enforce it.¹ If, however, the preliminary agreement leaves open any of the terms of the bargain, to be settled when the more formal instrument is drawn, there is clearly no complete or sufficient agreement.²

742. SIGNATURE OF THE PARTIES. — The statute of frauds also requires that the instrument shall be signed by the party to be charged, or by his authorized agent. A question has arisen whether the signature must be at the end of the instrument, or whether it is sufficient if the signature be inserted in the body of the instrument; as, "I, A. B., agree to sell," etc. The rule seems to be this: Although the name of the party to be charged appears only in the body of the instrument, yet, if it has been delivered by him as a completed instrument, it is a sufficient signature within the statute.³

When, however, it appears that the writing has not been delivered as a completed agreement, and that a signature in the usual way was contemplated, then the insertion of the name in the body of the instrument does not constitute a signing.⁴

In *Hawkins v. Chace*, *supra*, it was also decided that a printed signature, although inserted in the body of a bill of

¹ [Fowle v. Freeman, 9 Ves. 351.]

² *Chinnock v. Marchioness of Ely*, 4 De G., J. & S. 638; *Winn v. Bull*, L. R. 7 Ch. D. 29; *Bonnewell v. Jenkins*, L. R. 8 Ch. D. 70; *Carr v. Duval*, 14 Pet. 77; [*Frost v. Moulton*, 21 Beav. 596; *Race v. Weston*, 86 Ill. 91.]

[*Caton v. Caton*, L. R. 2 H. L. 127; *Higdon v. Thomas*, 1 Har. & G. 139; *Penniman v. Hartshorn*, 13 Mass. 87; *McConnell v. Brillhart*, 17 Ill. 354; *Anderson v. Harold*, 10 Ohio, 399; *Wise v. Ray*, 3 Greene (Iowa), 430.]

⁴ *Sanborn v. Sanborn*, 7 Gray,

³ *Hawkins v. Chace*, 19 Pick. 502; 142; [*Stokes v. Moore*, 1 Cox, 219.]

sale, is sufficient if it be adopted as his own by the party to be charged.¹

743. But if the statute expressly requires (as it does in some States) that the writing shall be "subscribed" by the party to be charged, a signing at the end of the instrument has been held to be necessary.² A signature by initials only is sufficient.³

Part Performance.

744. The part performance of an oral agreement for the sale of land will in equity remove the case from the operation of the statute of frauds, and entitle the purchaser to a specific performance.⁴

The ground of this equitable interference is commonly stated thus: Where a vendor has allowed a purchaser to perform in part an oral agreement, it is a fraud in him thereafter to set up the statute of frauds as an objection to the validity of the contract; and inasmuch as the statute of frauds was itself designed for preventing fraud, a court of equity will not allow it to be perverted in such a case to the uses of fraud.⁵

Whatever criticisms we might be disposed to make on the soundness of this reasoning, the rule itself is too well established to admit of any question at the present day. A court of equity will enforce an oral agreement, required by the

¹ [Schneider v. Norris, 2 M. & S. 286; Drury v. Young, 58 Md. 546.] The vendor as well as the vendee is entitled to specific performance, when he has performed in part

² James v. Patten, 6 N. Y. 9.

³ Sanborn v. Flagler, 9 Allen, 474, 478; [Salmon Falls Co. v. Goddard, 14 How. 446.] by giving possession: Wharton v. Stoutenburgh, 35 N. J. Eq. 266; Capehart v. Hale, 6 W. Va. 547; Walker v. Owen, 79 Mo. 563.]

⁴ [Pyke v. Williams, 2 Vern. 455; Cutler v. Babcock, 81 Wis. 195; Annan v. Merritt, 13 Conn. 478; Eyre v. Eyre, 19 N. J. Eq. 102; Grant v. Ramsey, 7 Ohio St. 157; Chicago, Burlington, &c. R. R. v. Boyd, 118 Ill. 73. *Contra*, Patton v. McClure, Mart. & Yerg. 333; Barnes v. Brown, 71 N. C. 507. ⁵ [Parkhurst v. Van Courtland, 14 Johns. 15; Seaman v. Aschermann, 51 Wis. 678; Tilton v. Tilton, 9 N. H. 385, 390; Hamilton v. Jones, 3 Gill & J. 127; Farrar v. Patton, 20 Mo. 81. This doctrine is recognized only in equity, not at law: Warner v. Texas & Pacific Ry. 54 Fed. Rep. 922.]

statute of frauds to be in writing, whenever there has been the requisite part performance. The more important present inquiry is,

745. WHAT IS SUFFICIENT PART PERFORMANCE?—It is universally agreed that the mere payment of the purchase-money does not constitute sufficient part performance. The reason of this is, that the purchaser has a full and adequate remedy at law for the recovery of the money paid, and he can thus be placed *in statu quo*.¹

746. Part performance is efficacious only when the vendor has allowed the purchaser to change his condition, in reference to the estate, so that he cannot be restored to his *statu quo*, or so as equitably to estop the vendor from saying that he has not bound himself to sell.²

747. Possession taken of the premises by the vendee is sufficient part performance, according to the authorities, which are almost unanimous upon this point.³

In *Glass v. Hulbert*⁴ it is intimated that a mere change of possession without further acts done by the vendee is not of itself sufficient, but this is contrary to the rule as generally adopted.

748. CHARACTERISTICS OF EFFECTIVE POSSESSION.—
(a) There must be a change of possession from the vendor to the vendee. If the party setting up the oral agreement was already in possession, as tenant of the vendor for instance,

¹ [Buckmaster v. Harrop, 7 Ves. 25 Ill. 114; Newton v. Swazey, 8 341; Stark v. Wilder, 36 Vt. 752; N. H. 9; Green v. Jones, 76 Me. Horn v. Ludington, 32 Wis. 73; 563; Griffith v. Abbott, 56 Vt. 356; Kidder v. Barr, 35 N. H. 235; Forrester v. Flores, 64 Cal. 24. So Bechtel v. Cone, 62 Md. 498. Where there was an agreement by parol to lease for three years, and the tenant took possession, this was held to be a sufficient part performance: Eaton v. Dodge, 122 Ill. 528; Crabill v. Whitaker, 18 Conn. 222. Possession without payment is sufficient: v. Marsh, 38 Ohio St. 331.]

² Purcell v. Miner, 4 Wall. 513; Moreland v. Lemasters, 4 Blackf. Glass v. Hulbert, 102 Mass. 24; 383. But see Dougan v. Blocher, Browne on the Statute of Frauds, 24 Pa. St. 28.]

³ 463. ⁴ 102 Mass. 24, 28, *supra*. See,

⁵ Browne on the Statute of Frauds, §467; [Ramsey v. Liston, also, Burns v. Daggett, 141 Mass. 368.

then of course his continued possession has of itself no significance, and therefore is not evidence of the alleged contract.¹

(b) The possession must be under color of, and in pursuance of, the contract.²

(c) It must be open and visible, — notorious.³

(d) It must be exclusive,⁴ *i. e.* the vendee must be the sole occupant, and his possession must be peaceful and undisputed. If it is contested by the vendor, then it is not sufficient, for his possession is efficacious only when it has been delivered to him by the vendor in pursuance of the contract. To follow the language of Mr. Justice Grier in *Purcell v. Miner*,⁵ the proof must be “that delivery of possession has been made in pursuance of the contract, and acquiesced in by the other party. This will not be satisfied by proof of a scrambling and litigious possession.”

Possession, accompanied by expenditures made with the knowledge, actual or presumed, of the vendor, or accompanied by improvements upon the estate, is universally held to be part performance.⁶

¹ *Barnes v. Boston & Maine Railroad*, 130 Mass. 388; [*Wills v. Stradling*, 3 Ves. Jr. 378; *Osborn v. Phelps*, 19 Conn. 63; *Johnston v. Glancy*, 4 Blackf. 94. And so where a tenant holds over after his lease has expired: *Knoll v. Harvey*, 19 Wis. 99. See, on the general subject, *Johns v. Johns*, 67 Ind. 440; and *Drury v. Conner*, 6 Har. & J. 288. For a case where a contract by a husband to convey a house to his wife was specifically enforced, — her occupancy with him being held under the circumstances to be sufficient part performance, — see *Barbour v. Barbour*, 49 N. J. Eq. 429. *Contra*, *Trammell v. Craddock*, 93 Ala. 450. See, also, p. 495, *infra*.]

² [*Andrews v. Babcock*, 63 Conn. 109; *Shahan v. Swan*, 48 Ohio St.

25; *Chesapeake, &c. Canal Co. v. Young*, 3 Md. 480; *Peckham v. Barker*, 8 R. I. 17; *Ham v. Goodrich*, 33 N. H. 32; *Phillips v. Thompson*, 1 Johns. Ch. 131, 147; *Brown v. Brown*, 33 N. J. Eq. 650; *Smith v. Pierce*, 65 Vt. 200.]

³ [*Frostburg Coal Co. v. Thistle*, 20 Md. 186; *Brawdy v. Brawdy*, 7 Pa. St. 157; *Charpiot v. Sigerson*, 25 Mo. 63.]

⁴ [*Haslet v. Haslet*, 6 Watts (Pa.), 464. For a case where an agreement to transfer was enforced against a co-tenant, see *Littlefield v. Littlefield*, 51 Wis. 23.]

⁵ 4 Wall. 513.

⁶ *Neale v. Neales*, 9 Wall. 1; *Potter v. Jacobs*, 111 Mass. 32; *Fry's Specific Performance*, § 585, Am. ed. But see *Burns v. Daggett*, 141 Mass. 368, where the

749. The doctrine of part performance is not confined to parol agreements for the sale of an interest in land; it applies also to parol agreements relating to an easement, and also to all cases in which a court of equity would entertain a suit for specific performance if the alleged contract had been in writing.¹

Specific Performance Generally.

Now that we have ascertained what constitutes sufficient evidence of a contract in a court of chancery, or sufficient part performance, some general considerations regulating the exercise of this equitable jurisdiction to enforce contracts remain to be stated.

750. First, the specific performance of a contract is not a matter of strict legal right; it is always a matter within the discretion of the court, to be granted or refused, according to all the equities of the case.

Although a valid contract has been made, a court of equity will never enforce it if it be hard and unconscionable² in itself, or if, without fault of either party, "its enforcement, from subsequent events, or even from collateral

court say that the expenditures must have been "such that adequate compensation could not be made for them except by the conveyance of the premises." This practically annuls the effect of expenditures in most cases. [See, also, *Moore v. Small*, 19 Pa. St. 461. Other cases of part performance are: *Blunt v. Tomlin*, 27 Ill. 93; *Freeman v. Freeman*, 43 N. Y. 34; *Manly v. Howlett*, 55 Cal. 94; *Halsey v. Peters*, 79 Va. 60; *Anderson v. Shockley* 82 Mo. 250. For cases in which it was held that the acts in question did not constitute part performance, see *Dunphy v. Ryan*, 116 U. S. 491; *Abbott v. Baldwin*, 61 N. H. 583; *Graatz v. Graatz*, 4 Rawle (Pa.), 411; *Colgrove v. Solomon*, 34 Mich. 494; *Lydick v. Holland*, 83 Mo. 703.]

¹ *McManus v. Cooke*, L. R. 35 Ch. D. 681, 697.

² [This is upon the principle that "he who comes into equity must do so with clean hands:" *Mississippi, &c. Railroad Co. v. Cromwell*, 91 U. S. 643; *Seymour v. DeLancy*, 3 Cowen, 445; *Quinn v. Roath*, 37 Conn. 16; *Williams v. Williams*, 50 Wis. 311; *King v. Hamilton*, 4 Peters, 311; *Snell v. Mitchell*, 65 Me. 48; *Eastman v. Plumer*, 46 N. H. 464; *Miller v. Chetwood*, 2 N. J. Eq. 199; *Weise's Appeal*, 72 Pa. St. 351; *Fish v. Leser*, 69 Ill. 394. Nor will specific performance be decreed unless it appears that the plaintiff has performed, or has been able and willing to perform, his part: *Thaxter v. Sprague*, 159 Mass. 397; *Fitzpatrick v. Beatty*, 6 Ill. 454.]

circumstances,¹ would work hardship or injustice to either of the parties,"² but the parties will be left to their remedy at law.

And here a sharp line of distinction exists between courts of chancery and courts of common law. If a contract is strictly valid, when sued upon at law the court must give it effect, no matter how hard or oppressive it may be. A court of law cannot decline to give effect even to a penalty. But when a court of equity is asked to enforce a contract confessedly legal and valid, its first inquiry is, is it reasonable and fair, or will its strict performance result in hardship and injustice rather than in justice? It will never lend its aid to an act of oppression, but it will leave the party in such a case to whatever remedy a court of law may give to him.

751. If a contract is hard and unconscionable, although not tainted with fraud nor strictly invalid at law, a court of equity will not enforce it.³ Chief Justice Marshall said, in *Cathcart v. Robinson*:⁴ "The difference between that degree of unfairness which will induce a court of equity to interfere actively by setting aside a contract, and that which will induce a court to withhold its aid, is well settled. . . . A defendant may resist a bill for specific performance by showing that under the circumstances the plaintiff is not entitled to the relief he asks. Omission or mistake in the agreement; or that it is unconscientious or unreasonable; or that there has been concealment, misrepresentation, or any unfairness, — are enumerated among the cases which will

¹ [As where the vendor had an independent claim against the vendee, which he could not enforce because the latter was insolvent.]

² *Willard v. Tayloe*, 8 Wall. 557, 566; [*Pratt v. Carroll*, 8 Cranch, 471; *Perkins v. Wright*, 3 Har. & McH. 324; *Randolph v. Quidnick*, 135 U. S. 457; *Leicester Piano Co. v. Front Royal, &c. Co.* 55 Fed. Rep. 190.]

³ [*Meidling v. Trefz*, 48 N. J. Eq. 638; *Modisett v. Johnson*, 2 Blackf.

431; *Mortlock v. Buller*, 10 Ves. 292; *Frisby v. Ballance*, 5 Ill. 287; *Rodman v. Zilley*, 1 N. J. Eq. 320; *Smoot v. Rea*, 19 Md. 398; *Blackwilder v. Loveless*, 21 Ala. 371; *Patterson v. Bloomer*, 35 Conn. 57. So a court of equity may refuse specific performance of a contract, and yet decline to rescind it: *Davis v. Read*, 37 Fed. Rep. 418.]

⁴ 5 Peters, 264, 276. See, also, *King v. Hamilton*, 4 Peters, 311.

induce the court to refuse its aid. If to any unfairness a great inequality between price and value be added, a court of chancery will not afford its aid."

752. However, mere discrepancy between the price and the value of the thing sold, in the absence of any unfairness or misleading, will not prevent the court from enforcing performance.¹

To constitute evidence of fraud, as we have seen already, the disproportion must be gross, and such as to shock the conscience.

In *Park v. Johnson*² the court said that the inadequacy of price must be such "as to give to the contract the character of unreasonableness and hardship."

In *Western Railroad Co. v. Babcock* it is said: "The inadequacy must be so gross, and the proof of it so great, as to lead to a reasonable conclusion of fraud or mistake."³

753. MISREPRESENTATION, in order to avoid the contract in equity, must relate to some material matter constituting an inducement to the contract, respecting which the complaining party did not possess the means of knowledge, and he must have relied upon the misrepresentation.

In *Slaughters v. Gerson*⁴ the court say: "A court of equity will not undertake, any more than a court of law, to relieve a party from the consequences of his own inattention and carelessness. Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the

¹ *Lee v. Kirby*, 104 Mass. 420; 76 Va. 517; *Minturn v. Seymour*, 4 Johns. Ch. 497; *Black v. Cord*, 2 H. & G. 100; *Tolleson v. Blackstock*, 95 Ala. 510. But such a contract may be enforced when substantial repairs have been made, or money and labor have been expended on the premises: *Dougherty v. Harsel*, 91 Mo. 161; *Griggsby v. Osborn*, 82 Va. 371.]

² 4 Allen, 259.

³ 6 Met. 346, 357. [Such a case was *Phillips v. Pullen*, 45 N. J. Eq. 5.]

⁴ 13 Wall. 379.

⁵ *Underwood v. Hitchcox*, 1 Ves. Sen. 279; *Emery v. Wase*, 8 Ves. Jr. 505; *Seymour v. Delancy*, 3 Cowen, 445; *Hale v. Wilkinson*, 21 Grattan, 75; *Bean v. Valle*, 2 Mo. 103; *Powers v. Hale*, 25 N. H. 145; *Benton v. Shreeve*, 4 Ind. 66. Courts will not enforce a contract which is a mere gift, even although the contract is under seal, and the donee has taken possession of the property: *Jefferys v. Jefferys*, Cr. & Ph. 138; *Callaghan v. Callaghan*, 8 Cl. & Fin. 374; *Keffer v. Grayson*,

purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations."¹

But specific performance will not be decreed where the purchaser "will get something different from that which he has been led to expect," as where the vendor puts into his conditions of sale a statement which misleads the purchaser.² And this is true although the vendor might recover at law.

Sometimes, however, when there has been a misrepresentation by the vendor as to the value of the estate, the court will nevertheless decree specific performance against the vendee, with a suitable reduction of the price agreed upon.³

754. MISTAKE. — Equity will never lend its aid to enforce a contract which one of the parties did not intend to make, and consequently mistake in a written agreement is always a good defence to a bill for its specific performance.⁴ The mistake may be proved by oral evidence.⁵

755. Where (as we have seen under the head of Mistake) the object of the bill is to correct an alleged mistake by adding to a deed or other instrument something erroneously omitted from it, if the clause omitted is required by the

¹ [Fenton v. Browne, 14 Ves. 144.]

² *In re Davis & Cavey*, L. R. 40 Ch. D. 601. [In an action at law, in such a case, the vendee must show that the misrepresentation was intentional; but in a suit in equity for specific performance, it is enough for the vendee to show that there was a misrepresentation, and that he acted upon it. The following are cases of misrepresentation by the vendor: *Whittemore v. Whittemore*, L. R. 8 Eq. 603; *Boynton v. Hazelboom*, 14 Allen, 107; *Holmes's Appeal*, 77 Pa. St. 50; *Isaacs v. Skrainka*, 95 Mo. 517; *Best v. Stow*, 2 Sandf. Ch. 298; *King v. Spaeth*, 50 N. J. Eq. 378; *Kelly v. Central Pacific Railroad Co.* 74 Cal. 557. In the following case specific per-

formance was refused, because the vendee — who had opportunities for knowledge which the vendor had not — misrepresented to the vendor the value of the land sold: *Swimm v. Bush*, 23 Mich. 99.]

³ *Powell v. Elliot*, L. R. 10 Ch. App. 424.

⁴ *Bradford v. Union Bank*, 13 How. 57, 66; [*Thwing v. Hall Lumber Co.* 40 Minn. 184; *Mansfield v. Sherman*, 81 Me. 365; *Buckley v. Patterson*, 39 Minn. 250. The mistake must be a material one: *Parker v. Taswell*, 2 De Gex & J. 559.]

⁵ [*Malins v. Freeman*, 2 Keen, 25; 2 Pomeroy's Eq. § 860. Even though the party seeking relief drew the instrument himself: *Ball v. Storie*, 1 Sim. & St. 210.]

statute of frauds to be in writing, it is held by some courts that the omission cannot be proved by parol testimony.¹ But this rule is confined to those cases where it is sought to enforce an agreement: it does not apply when the omission is set up in defence to a bill for specific performance; in such cases the omission may always be proved by parol evidence.

In *Glass v. Hulbert*, *supra*, the court expressly recognize this distinction as follows:—

“Relief in this form [as a defence], although procured by parol evidence of an agreement differing from the written contract, with proof that the difference was the result of accident or mistake, does not conflict with the provisions of the statute of frauds. That statute forbids the enforcement of certain kinds of agreement without writing; but it does not forbid the defeat or restriction of written contracts, nor the use of parol evidence for the purpose of establishing the equitable grounds therefor.”

756. When a mistake by omission, thus set up in defence, goes to the substance of the agreement, the bill for specific performance will be dismissed. But if it affects merely some detail of the agreement, so that specific performance of the agreement, as corrected by supplying the omission, would not be inequitable, the court, as a rule, will decree such performance, at the request of either plaintiff or defendant.² Where a parol variation from the written agreement is set up in the answer and made out, the court will ordinarily enforce the agreement as thus modified. And this will usually be done without amending the bill, and without the filing of a cross-bill.³ But where the plaintiff fraudulently attempts to enforce a written contract, knowing that it is incomplete, his bill will be dismissed.⁴

¹ *Glass v. Hulbert*, 102 Mass. 24, 35.

² *Bradford v. Union Bank*, 13 How. 57, 69; *Park v. Johnson*, 4 Allen, 259, 262. *In re Fawcett & Holmes*, L. R. 42 Ch. D. 150; [*Keiselbrack v. Livingston*, 4 Johns. Ch. 144, 148; *Hendrickson v. Ivins*, 1

N. J. Eq. 562; *Popplein v. Foley*, 61 Md. 381; *Bellows v. Stone*, 14 N. H. 175; 2 Pomeroy's Eq. § 861, *et seq.*]

³ *Bradford v. Union Bank*, 13 How. 57, 68; *Park v. Johnson*, 4 Allen, 259, 265.

⁴ *Park v. Johnson*, *ibid.*

757. As a general rule, a contract must be mutual, or equity will not enforce it.¹ By "mutual" is meant a contract which each party has a right to enforce against the other. If, by the terms of the contract, its execution is optional with one party but obligatory upon the other, it is not a mutual but a unilateral contract; and ordinarily equity will refuse to enforce it, leaving the party to his remedy at law.² But if the party who signed the contract has received the benefit or consideration coming to him under the contract, it may then be enforced against him, although originally it was only a unilateral contract.³

758. To this rule there is one important exception, that, namely, of contracts under the statute of frauds for the sale of real property, or any interest therein. Such contracts are valid under the statute, provided that they are signed "by the party to be charged;" and it has long been settled that equity will enforce a contract of this kind against the party who has signed it in favor of the party who did not sign it, and who therefore was not bound by it.⁴ The better ground upon which this doctrine rests is, that the plaintiff by bringing his bill waives the original want of mutuality, and makes the remedy mutual.⁵

¹ [Wylson v. Dunn, L. R. 34 Ch. D. 566; Bourget v. Monroe, 58 Mich. 563; Glass v. Rowe, 103 Mo. 513. So an infant cannot have specific performance, for, since he is not bound by his contract, there is no mutuality. Flight v. Bolland, 4 Russ. 298. So where the plaintiff has agreed to perform personal services, he cannot have specific performance against the defendant, because the court could not decree specific performance of his agreement, so that there is no mutuality. Cooper v. Pena, 21 Cal. 403; Wakeham v. Barker, 82 Cal. 46. So where the plaintiff agrees to convey something which he does not own: Norris v. Fox, 45 Fed. Rep. 406; Chilhowie Iron Co. v.

Gardiner, 79 Va. 305; Luse v. Deitz, 46 Iowa, 205. The contract must be mutual in obligation as well as in remedy: Iron Age Co. v. Western Union Telegraph Co. 83 Ala. 498. But there need not have been mutuality of remedy *ab initio*. Brown v. Munger, 42 Minn. 482.]

² Fry on Specific Performance, § 440, and the cases there cited.

³ Richardson v. Hardwick, 106 U. S. 252, 255; [Welch v. Whelpley, 62 Mich. 15.]

⁴ [Docter v. Hellberg, 65 Wis. 415; Rogers v. Saunders, 16 Me. 92; Hodges v. Kowing, 58 Conn. 12; Moses v. McClain, 82 Ala. 370; Love v. Welch, 97 N. C. 200.]

⁵ Fry on Specific Performance, § 450, and cases there cited.

759. Another seeming exception is the case of conditional or optional contracts. For example, there is an offer to sell on condition that the offer is accepted within a certain time. If the party to whom the offer is made accepts it within the time named, there is then a mutual contract which equity will enforce against the vendor, although it was not binding upon the vendee until he accepted the offer.¹ In such a case the person making the offer has a right to retract it at any time before acceptance, so that the rule of mutuality is not violated.

760. TIME THE ESSENCE OF A CONTRACT. — The rule, as formerly stated, was that in equity time is not of the essence of a contract.² The meaning of this was that, in case of an agreement to sell or to buy, the failure of either party to perform the agreement by the day fixed was not a conclusive reason for refusing to decree a performance of the contract, at the suit of the party so failing, provided that within a reasonable time he offered to do his part. Time, it was said, not being of the essence, neither party forfeited his rights under the contract by mere want of punctuality in performing it. But, as was well remarked by Judge Lowell,³ the cases under the exceptions to this rule have become more numerous than those under the rule itself. It would be quite as correct to say that time is, as to say that time is not, of the essence of the contract. Neither proposition would be accurate.

The true rule, I think, is this: Time is or is not of the essence of the contract according to the circumstances of each particular case. But to this statement it should be added

¹ *Boston & Maine R. R. v. Bartlett*, 3 Cush. 224; *Fry on Specific Performance*, §§ 445, 446; [*Watts v. Kellar*, 56 Fed. Rep. 1; *Woodruff v. Woodruff*, 44 N. J. Eq. 349; *Calanchini v. Branstetter*, 84 Cal. 249.]

² [*Seton v. Slade*, 7 Ves. 265; *Webb v. Hughes*, L. R. 10 Eq. 281; *Brown v. Guaranty Trust Co.* 128 U. S. 403; *King v. Ruckman*, 20 N. J. Eq. 316; *Day v. Hunt*, 112 N. Y. 191; *Sylvester v. Born*, 132 Pa. St. 467; *Jones v. Robbins*, 29 Me. 351; *Ewins v. Gordon*, 49 N. H. 444; *Schields v. Horbach*, 28 Neb. 359; *Dynan v. McCulloch*, 46 N. J. Eq. 11; *Austin v. Wacks*, 30 Minn. 335.]

³ *Prentice v. Betteley*, 2 Lowell's Dec. 289.

that equity is not disposed to work a forfeiture of any right for want of punctuality, and therefore equity is disposed to hold that time is not essential unless the parties themselves clearly intended, or the justice of the case requires, that it should be treated as essential. It is also to be observed that, owing to the rapid changes in the value of real estate in this country, our courts are more inclined than the English courts to hold that time is essential in contracts for the sale or purchase of real property. The whole doctrine is well stated and the cases are cited in *Barnard v. Lee*.¹

761. Parties may expressly agree that time shall be of the essence of their contract, and that a failure of due performance by either party shall avoid the contract at the option of the other;² and such a stipulation is commonly as binding in equity as at law. But even in this case, if the failure of one party to perform punctually has been induced in any degree by the conduct of the other, equity will hold him estopped to set it up.³ So, also, where there has been part payment or other part performance, equity will not ordinarily allow a failure in point of time to operate as a forfeiture.

¹ 97 Mass. 92. See, also, *Ahl v. Johnson*, 20 How. 511; *Secombe v. Steel*, 20 How. 94; *Taylor v. Longworth*, 14 Pet. 172; *Jones v. Robins*, 29 Me. 351; *Hull v. Noble*, 40 Me. 459. In the following cases time was held to be essential: *Holt v. Rogers*, 8 Pet. 420; *Goldsmith v. Guild*, 10 Allen, 239; *Chaffee v. Middlesex R. R.* 146 Mass. 224; *Carter v. Phillips*, 144 U. S. 100.

² [*Parkin v. Thorold*, 16 Beav. 59; *Hudson v. Temple*, 29 Beav. 536; *Benedict v. Lynch*, 1 Johns. Ch. 370; *Sowles v. Hall*, 62 Vt. 247; *Prince v. Griffin*, 27 Iowa, 514; *Grey v. Tubbs*, 43 Cal. 359. See, also, *Griffin v. City Bank of Macon*, 58 Ga. 584. Time may be made essential by implication: *Tilley v. Thomas*, L. R. 3 Ch. App. 61; *Day v. Luhke*, L. R. 5 Eq. 336; *Renter*

v. Sala, L. R. 4 C. P. D. 239; *Heyt v. Tuxbury*, 70 Ill. 331. In contracts giving an option to buy, time is ordinarily essential: *Harding v. Gibbs*, 125 Ill. 85; *Stembridge v. Stembridge*, 87 Ky. 91; *Coleman v. Applegarth*, 68 Md. 21. See, also, *Gedye v. Duke of Montrose*, 26 Beav. 45. Laches in bringing suit for specific performance will bar relief: *Pollard v. Clayton*, 1 Kay & J. 462; *McCabe v. Mathews*, 40 Fed. Rep. 338; *Alexander v. Wunderlich*, 118 Pa. St. 610; *Fowler v. Marshall*, 29 Kan. 665.]

³ *Svaboda v. Cheney*, 28 Fed. Rep. 500; [*Holgate v. Eaton*, 116 U. S. 33; *Cheney v. Libby*, 134 U. S. 68; *Baumann v. Pinckney*, 118 N. Y. 604; *Hudson v. Bartram*, 3 Madd. 440.]

762. PERFORMANCE WITH A VARIATION. — A vendor must be able to deliver substantially what he has agreed to sell, or equity will not require the vendee to accept it. At law a vendor has no action against the vendee unless he can carry out his contract precisely as he has made it, both as to title and as to quantity.¹ But this is not quite the rule in equity. If the vendor can perform substantially what he has agreed to do, failing only in some slight or immaterial matter, equity will enforce the contract against the vendee, if reasonable compensation in money can be made to him for the deficiency.² Thus, if the bargain was for a certain estate, and the vendor fails to make out a good title as to a very small part of it, and that part is not material to the possession and enjoyment of the whole, specific performance, with compensation, will be decreed against the vendee.³ Or, if the bargain is for a certain house at one price and the furniture in it at another, it has been held that if for any reason the vendor cannot complete his contract as to the furniture, and the furniture is not essential to the enjoyment of the estate, equity will require the vendee to take the real estate.

In *Richardson v. Smith* ⁴ Lord Hatherley stated the doctrine upon this point as follows: —

“It has been settled that with regard to that which is not absolutely essential to the enjoyment of the estate, and is but a small adjunct to the purchase, the court may, if a good title cannot be made to the adjunct, direct an inquiry whether it is essential to the enjoyment of the whole. If it be, the contract cannot be enforced, and the parties will be left to their remedy at law. But if it be not, the court will force on the purchaser the purchase of the estate, and will not let him off his purchase because there happens to be a defect in the title as to a few acres, or as to the quantity de-

¹ [*Smyth v. Sturges*, 108 N. Y. 278; *Morgan v. Brast*, 34 W. Va. 495; *Johnson v. Johnson*, 3 B. & P. 332.]
162.]

² [*Towner v. Tickner*, 112 Ill. 467; *In re Fawcett & Holmes*, L. 217; *Stevenson v. Polk*, 71 Iowa, R. 42 Ch. D. 150.]

⁴ L. R. 5 Ch. App. 648.

scribed, where it is small in proportion to the whole quantity agreed to be sold."

763. But this is hazardous doctrine. The equity which lies at the very foundation of the rule of specific performance prohibits forcing upon a purchaser a contract which he never made; and whenever a court undertakes to determine what variation from the original bargain is or is not material, it is in a measure undertaking to make a new bargain for the purchaser, and to force upon him what he never agreed to buy.¹ Therefore this doctrine of performance with a variation should not be applied except where it is clear that the variation is slight, that it has no injurious effect upon the purchaser, and that his attempt to take advantage of it is made in bad faith, with the object of evading his just obligations.

764. It should be added that under this rule the court will never compel a purchaser to accept a doubtful title, or one different from that which he bargained for, or one which may expose him to litigation.² The vendor must make out a good title beyond a reasonable doubt.³ Title by adverse possession is not a good title.⁴ It is enough, however, if the vendor has a good title when it becomes his duty to convey, although it may not have been good at the date of the contract.⁵ If the doubt as to the title arises entirely from a question of law, no facts being in dispute, and if all the parties in interest are before the court, the court will decree performance if they decide that the title is good.⁶

But where the question is whether the title is held by the

¹ [Kenner v. Bitely, 45 Fed. Rep. 184; Sturtevant v. Jaques, 14 Allen, 523; [Hedderly v. Johnson, 42 Minn. 443; Gill v. Wells, 59 Md. 492.]

² Drewe v. Corp, 9 Ves. 368; Richmond v. Gray, 3 Allen, 25; [Cato v. Thompson, L. R. 9 Q. B. 616. See, also, Irving v. Campbell, 121 N. Y. 353; Cornell v. Andrews, 35 N. J. Eq. 7; Close v. Stuyvesant, 132 Ill. 607; Linn v. McLean, 80 Ala. 360; Swepson v. Johnston, 84 N. C. 449.]

³ Noyes v. Johnson, 139 Mass. 436.

⁴ Dresel v. Jordan, 104 Mass. 407; [Mortlock v. Buller, 10 Ves. 292, 315.]

⁵ Chesman v. Cummings, 142 Mass. 65, and cases cited.

⁶ Jeffries v. Jeffries, 117 Mass.

vendor, or by some third person not before the court, the vendee should not be compelled to accept the title, because the decision of the court in that case would not protect him against the claim of such third person.¹

765. Where a vendor is unable to convey a complete title, equity will usually compel him, at the election of the vendee, to perform his contract, so far as he is able to do so, making a compensation in money to the vendee for the deficiency.² There is no injustice in this rule. If the vendee is willing to accept such a title as the vendor can give, with compensation for the defect, the vendee receives no more than he is entitled to receive, and the vendor certainly has no right to complain.

Who may bring the Bill.

766. A vendor is entitled to specific performance, as well as the vendee.³ If a vendor dies before making the conveyance, the bill for specific performance should be brought against his heirs or devisees, for the legal title is in them.⁴

In Massachusetts, however, there is a statutory provision⁵ for bringing such suits against the executor or administrator of the vendor, who will be directed to make the proper conveyance.

767. The assignee of a bond or contract for the conveyance of land may bring a bill in his own name for specific

¹ The English courts, however, are inclined to hold otherwise. See the cases cited *supra*.

² *Park v. Johnson*, 4 Allen, 259; *Davis v. Parker*, 14 Allen, 94; [*Bostwick v. Beach*, 103 N. Y. 414, 422; *Heirs of Roberts v. Lovejoy*, 60 Tex. 253.]

³ *Old Colony R. R. Co. v. Evans*, 6 Gray, 25. *Jones v. Newhall*, 115 Mass. 244, is *non contra*; that case decides merely that a vendor is not entitled to specific performance when nothing remains to be done except payment of the consideration, for the vendor in such an event has a complete remedy at law. The general doctrine that a vendor may

have specific performance is stated in *Jones v. Newhall*, and *Old Colony R. R. Co. v. Evans*, is cited. [*Cogent v. Gibson*, 33 Beav. 557; *Kenney v. Wexham*, 6 Madd. 355; *Hopper v. Hopper*, 16 N. J. Eq. 147; *Crary v. Smith*, 2 N. Y. 60; *Cook v. Grant*, 16 S. & R. 198, 209; *Brown v. Haff*, 5 Paige, 235; *Raymond v. San Gabriel Co.* 53 Fed. Rep. 883; *Blackwell v. Ryan*, 21 S. C. 112.]

⁴ [*Young v. Young*, 45 N. J. Eq. 27; *Leeper v. Lyon*, 68 Mo. 216. See, also, *Newton v. Swazey*, 8 N. H. 9; *Fry's Specific Performance*, Amer. ed. § 190.]

⁵ Pub. Stats. ch. 142, § 1.

performance,¹ and this is true although the word "assigns" does not occur in the contract.² Moreover, the assignment may be proved by parol, as by the mere delivery of the instrument by the assignor to the assignee.³ In case of the vendee's death, the bill for specific performance must be brought by his heirs, not by his executor or administrator.⁴ The vendee's right to a bill for specific performance still remains although the vendor has given a bond to pay a certain sum, either as a penalty or as liquidated damages, in the event of his failure to convey. The bond in such a case will be regarded as affording a cumulative or alternative remedy which the vendee may pursue or not, at his election.⁵ What persons are entitled to bring a bill for specific performance, I have considered more fully in a previous lecture.⁶

Lis Pendens.

768. At this point a brief statement of the doctrine of *lis pendens* seems to be required. How far is a pending⁷ suit notice to third parties, and how far are third parties affected by a judgment therein? The modern doctrine upon this subject, aside from statutes, is, I think, as follows:—

(1) Any suit at law or in equity which concerns the title to real estate is notice to all the world of the title of the respective parties to the suit, and whoever buys of either party

¹ [Miller v. Bear, 3 Paige, 466; Miller v. Whittier, 32 Me. 203; Colerick v. Hooper, 3 Ind. 316; Columbia Water Power Co. v. Columbia, 5 S. C. 225.]

² Currier v. Howard, 14 Gray, 511.

³ Currier v. Howard, *supra*.

⁴ Caverly v. Simpson, 132 Mass. 462; [Webster v. Tibbits, 19 Wis. 438; House v. Dexter, 9 Mich. 246.]

⁵ Hooker v. Pyncheon, 8 Gray, 550; Dooley v. Watson, 1 Gray, 414; Connihan v. Thompson, 111 Mass. 270; Hall v. Sturdivant, 46 Me. 34; [French v. Macale, 2 Dr. & War. 269, 274; Phoenix Insur-

ance Co. v. Continental Insurance Co. 87 N. Y. 400. Unless it appears that payment of the sum named in the contract is intended as an alternative for the performance of the same: Bodine v. Glading, 21 Pa. St. 50; Martin v. Murphy, 129 Ind. 464.]

⁶ See p. 416, *supra*.

⁷ [In equity a suit begins to be *pendens*, when the bill has been filed and the subpoena has been served: Leitch v. Wells, 48 N. Y. 585; Duff v. McDonough, 155 Pa. St. 10; Grant v. Bennett, 96 Ill. 513; Center v. P. & M. Bank, 22 Ala. 743; Allen v. Poole, 54 Miss. 323.]

pending the suit is charged with notice of the title set up by the other, and will be bound by any judgment or decree affecting that title which may be rendered in the suit.¹

(2) The doctrine of *lis pendens* does not apply to promissory notes or other negotiable securities.² And therefore one who buys such securities in good faith from the holder of them takes a valid title, notwithstanding the pendency of a suit in which some third person is contesting the holder's title. It is otherwise where the purchaser has notice of the suit or counter-claim.

(3) The modern tendency is to extend the rule governing negotiable securities to all personal chattels the title to which passes by mere delivery, and of which no public record is necessary.³

769. In Massachusetts the common-law doctrine of *lis pendens* is modified by a statute⁴ which provides that no pending suit concerning real estate shall be notice to third persons unless a memorandum of the suit has been filed with the register of deeds in the county where the land lies.

770. I proceed now to apply this doctrine of *lis pendens* to the subject of specific performance. A suit pending for specific performance of a contract for the sale of real estate is, except in Massachusetts, notice to all the world. Whoever buys the property takes it with notice of the plaintiff's title; and a court of equity, upon a proper bill being brought

¹ *Murray v. Ballou*, 1 Johns. Ch. 566; [*Union Trust Co. v. Southern Navigation Co.* 130 U. S. 565; *McClackey v. Barr*, 48 Fed. Rep. 130; *Cable v. Ellis*, 120 Ill. 136; *Smith v. Hodsdon*, 78 Me. 180; *Rider v. Kelso*, 53 Iowa, 367; *Edwards v. Banksmith*, 35 Ga. 213. For the rationale of this doctrine, see *Belamy v. Sabine*, 1 De Gex & J. 566.]

² [*Hill v. Scotland County*, 34 Fed. Rep. 208; *Winston v. Westfeldt*, 22 Ala. 760; *Hibernian Bank v. Everman*, 52 Miss. 500; *Stone v. Elliott*, 11 Ohio St. 252. Nor does

it apply to corporation bonds: *Farmers' Loan & Trust Co. v. Toledo & S. R. R. Co.* 54 Fed. Rep. 759.]

³ *County of Warren v. Marcy*, 97 U. S. 96; [*Holbrook v. New Jersey Zinc Co.* 57 N. Y. 616; *Miles v. Lefi*, 60 Iowa, 168; *McLaurine v. Monroe*, 30 Mo. 462. But see *Thoms v. Southard*, 2 Dana (Ky.), 475, 480; *McCutchen v. Miller*, 31 Miss. 65.]

⁴ Pub. Stat. ch. 126, § 45, cl. 13. [For the statutes of the States in general upon this subject, see 2 Pomeroy's Eq. § 640.]

against him, will compel him to convey the land in pursuance of the original agreement. A proper bill for this purpose would be a supplemental bill. The remedy to prevent the original defendant from conveying the real estate *pendente lite* is a preliminary injunction.

Contracts for Personal Services.

771. As a general rule, equity will not undertake to enforce specific performance of contracts for personal services.¹ This is mainly because the execution of such contracts depends upon the skill, volition, and fidelity of the person who has engaged to perform them; and it is practically impossible for any court to supervise their execution, or to secure their faithful performance.

Where, however, the covenant of the party who is to perform the services amounts to an undertaking, express or implied, not to perform them for any one else, equity will enjoin the party from engaging in such competitive service. The leading authority upon this subject is *Lumley v. Wagner*.² In this case the defendant had made a contract with the plaintiff to sing at his theatre, and not to sing at any other theatre, during a certain period. The court did not attempt to enforce the specific performance of this contract, but it granted the plaintiff all the relief that it could by enjoining the defendant from singing at any rival theatre during the period fixed by the contract. Similar decisions have been made in subsequent cases.³

772. Still less will the court enforce performance of a contract for continuous services, when skill and experience are required not only to perform them, but also to determine

¹ *Johnson v. Shrewsbury, &c. Railway*, 3 De G., M. & G. 914; [*Cooper v. Pena*, 21 Cal. 403; *Buck v. Smith*, 29 Mich. 166; *Ikerd v. Beavers*, 106 Ind. 483; *Mowers v. Fogg*, 45 N. J. Eq. 120; *Wollensak v. Briggs*, 20 Ill. App. 50; *De Riva-finoli v. Corsetti*, 4 Paige, 264; *Campbell v. Rust*, 85 Va. 653. See, also, *Sloan v. Williams*, 138 Ill. 43.]

² 1 De G., M. & G. 604, overruling *Kemble v. Kean*, 6 Sims. 333.

³ *Webster v. Dillon*, 5 W. R. 867; *Montague v. Flockton*, L. R. 16 Eq. 189; *Wolverhampton, &c. Railway v. London & N. W. Railway Co. L. R. 16 Eq. 433*. [*Whitwood Chemical Co. v. Hardman* [1891], 2 Ch. 416, overrules *Montague v. Flockton*. See *infra*, page 443.]

whether or not they have properly been performed. Such a case was *Marble Company v. Ripley*,¹ where the agreement was to quarry and deliver to the plaintiff blocks of marble answering a certain description.

773. For the same reason, contracts to build or to repair will not, as a general rule, be enforced.² Where, however, a vendee has engaged to construct and maintain on the land purchased by him any works which are essential to the safe or convenient use of the vendor's adjoining land, the present tendency of the courts, in England at least, is to enforce the contract, although its performance involves the exercise of personal labor and skill.³

774. **CONTRACTS OF PARTNERSHIP.**—It is well settled that a court of equity will not enforce an executory contract to form and carry on a partnership, whether for a definite or indefinite term.

It was formerly doubted whether this rule was not confined to cases where the agreement was for an indefinite term. As to such cases a court of equity would not undertake to enforce specific performance, because the partnership, not being for a definite period, was terminable at any moment at the will of either party. It would be idle, there-

¹ 10 Wall. 339, 358, 359. See, also, *Powell Steam Co. v. Taff Vale Railway Co.* L. R. 9 Ch. App. 331; *Texas & St. Louis R. R. v. Rush*, 17 Fed. Rep. 275; and *Ross v. Union Pacific Railway Co.*, Woolworth, 26, where the cases are reviewed. [See, also, *Booth v. Pollard*, 4 Y. & C. 61; *Port Clinton Railroad v. Cleveland & Toledo Railroad*, 13 Ohio St. 544; *Iron Age Co. v. Western Union Co.* 83 Ala. 498. An agreement to submit a dispute to arbitration will not be enforced: *Hopkins v. Gilman*, 22 Wis. 476. The court will not decree specific performance of a contract for the violation of which no action at law would lie, such as an infant's contract to perform ser-

vices: *De Francesco v. Barnum*, L. R. 43 Ch. D. 165.]

² Fry on Specific Performance, Amer. ed. § 76, and cases cited; [Rayner v. Stone, 2 Eden, 128, 130 (n); Paxton v. Newton, 2 Sm. & G. 437; Flint v. Brandon, 8 Ves. 159; Brace v. Wehnert, 25 Beav. 348.]

³ *Storer v. Great Western Railway*, 2 Y. & C. Ch. 48; *South Wales Railway Co. v. Wythes*, 1 K. & J. 186, 200; *Wilson v. Furness Railway Co.* L. R. 9 Eq. 28. In *Wilson v. Northampton, &c. Railway Co.* L. R. 9 Ch. App. 279, the court declined to enforce an agreement for building and maintaining a railroad station, leaving the plaintiff to recover his damages at law.

fore, to force persons into a partnership from which either of them could legally withdraw so soon as it was made.¹

But it is now settled that the doctrine is not confined to agreements of this character, but extends to all merely executory agreements for a partnership, whether for a definite or indefinite period. One great reason for this is the nature of the relation itself. A partnership cannot be carried on to any advantage without mutual confidence and a common and actual interest in the enterprise. The only practicable course, therefore, is to leave the party to his remedy at law for breach of the contract.²

775. However, when by the terms of the agreement one party has acquired or is already entitled to an interest in any property which was to be the subject of the partnership, a court of equity will enforce the agreement so far as may be necessary to secure his interest in the property.³ Thus, where A, having made an invention, agreed with B that, if he would advance the necessary money to secure a patent and to introduce the article to the public, a partnership should be formed for selling the article by which B should be a joint owner of the patent and jointly share in the profits, and B had made the advances, the court enforced the agreement so far as the transfer to B of his interest in the patent was concerned.⁴

¹ [*Hercy v. Birch*, 9 Ves. 357 ; *Tobey v. County of Bristol*, 3 Story R. 800, 824 ; *Whitworth v. Harris*, 40 Miss. 483.]

² Fry on Specific Performance, § 1512 ; *Scott v. Rayment*, L. R. 7 Eq. 112 ; [*Buck v. Smith*, 29 Mich. 166 ; *Meason v. Kaine*, 63 Pa. St. 335, 341 ; *Reed v. Vidal*, 5 Rich. Eq. (S. C.) 289.]

³ [*Whitworth v. Harris*, 40 Miss. 483. Two anomalous cases of specific performance may be stated here : Where A advanced money to B, a farmer, on condition that B should send his crops to A for sale, a bill for specific performance by A

against B was sustained on several grounds : *Sullivan v. Tuck*, 1 Md. Ch. 59. Where the plaintiff had conveyed land to the defendant, a city, for a park, which land the city covenanted to inclose immediately, and to maintain as a park, the plaintiff's bill for specific performance was entertained, although his agreement with the city included a covenant for reëntury, so that he had also a remedy at law : *Stuyvesant v. Mayor of New York*, 11 Paige, 414.]

⁴ *Somerby v. Buntin*, 118 Mass. 279. For the general rule, see Story on Partnership, § 189.

776. CONTRACTS TO INSURE.—A court of equity will unhesitatingly enforce contracts to insure.¹

An oral contract to insure is valid, and will be enforced whenever it is clearly made out.²

Specific Delivery of Chattels.

777. Equity will entertain bills for the specific delivery of chattels of especial value to the owner against any one in wrongful possession, whenever the same cannot conveniently be reached by writ of replevin.³

The foundation of this doctrine is that the article in question, from its character or associations, has some peculiar interest or value to the owner, and therefore mere damages at law for its intrinsic value furnish no adequate compensation. This doctrine was established at an early date, in the case of *Duke of Somerset v. Cookson*,⁴ where a silver altar-piece, and in *Pusey v. Pusey*,⁵ where a horn was in question.

In *Earl of Macclesfield v. Davis*⁶ Lord Eldon said: "It is now too late . . . to discuss whether this court will interfere for the specific delivery of a chattel; and, if it will in such case, *à fortiori* the restitution of heirlooms must be decreed, upon which there never was any doubt."

This relief is especially adapted to the recovery of all articles having a historical or personal value from any family or other associations, to works of art, to deeds and other important or valuable instruments.⁷

778. In Massachusetts there is a statute,⁸ originally passed long before the Supreme Court had acquired equity jurisdic-

¹ [Even after a loss has occurred: *Brooklyn Fire Insurance Co. v. Tayloe v. Merchants' Fire Insurance Co.* 9 How. 390; *Carpenter v. Mutual Insurance Co.* 4 Sandf. Ch. 408; *Mead v. Davison*, 3 Ad. & E. 303.]

² [Baum's Appeal, 113 Pa. St. 58.]

³ 3 P. Wms. 390.

⁴ 1 Vernon, 273.

⁵ 3 Vesey & Beames, 16.

⁶ *Union Mutual Insurance Co. v. Commercial Mutual Marine Insurance Co.* 2 Curtis, C. C. R. 524, affirmed in 19 How. 318; *Sanborn v. Fireman's Insurance Co.* 16 Gray, 448. [*First Baptist Church v.*

⁷ [Fells v. Read, 3 Ves. 70; *Lady Beresford v. Driver*, 16 Beav. 134; *McGowin v. Remington*, 12 Pa. St. 56; *Pattison v. Skillman*, 34 N. J. Eq. 344.]

⁸ Pub. Stats. ch. 151, § 2, cl. 4.

tion, authorizing a bill in equity to reach articles secreted so that they cannot be taken by writ of replevin at law. This statute is still in force, although the court now has also full equity jurisdiction upon the subject. It has been applied to the case of a watch or other article worn upon the person, and therefore not subject to replevin;¹ and also to promissory notes of third persons belonging to the plaintiff, but in the possession of the defendant.²

779. It is also settled (at least in England) that where chattels are unlawfully withheld from the owner by one standing in a fiduciary relation toward him, as an agent or trustee, a bill will lie for their delivery, although they have not any special value beyond what might be compensated for in damages.³

¹ *Maxham v. Day*, 16 Gray, 213, [Pooley v. Budd, 14 Beav. 34; 219. Peer v. Kean, 14 Mich. 354; Good-

² *Sears v. Carrier*, 4 Allen, 339. win Gas Stove Company's Appeal,

³ *Wood v. Rowcliffe*, 3 Hare, 117 Pa. St. 514; *Weaver v. Fisher*, 304, affirmed by Lord Chancellor 110 Ill. 146.]
Cottenham, 2 Phillips Rep. 382;

CHAPTER XXVIII.

INJUNCTION.

780. THE second great equitable remedy is that of injunction. Just as the common law is powerless to compel the performance of contracts, and can only give a remedy, after they are broken, for the damages sustained, so also it cannot prevent a threatened injury to property. It must wait until the wrong has been done, and then its only remedy is to give damages for the injury inflicted.

It is not so with equity. Equity can prevent a threatened wrong or injury from being done, or, if it be done already, equity can in many cases repair the injury by requiring the property and the parties to be placed *in statu quo*, i. e. in the condition in which they were before the wrong was done. This it accomplishes by the writ of injunction.

Injunction is an order or process commanding the defendant to abstain from doing, or commanding him to perform, a certain act. It may be, therefore, either preventive or remedial in its operation, and consequently injunctions are divided into two great classes, prohibitory injunctions and mandatory injunctions.

Prohibitory injunctions, as the name imports, are those injunctions which require the defendant to abstain from doing a certain act, or from pursuing a certain line of conduct; and these constitute by far the larger part of injunctions granted by courts of equity.

Mandatory injunctions are those which require the defendant to do some act.¹ They are frequently issued upon

¹ [Chicago, &c. Railway Co. v. Eq. 6. To deliver church records : Kansas, &c. Railway Co. 38 Fed. Lutheran Church v. Gristgau, 34 Rep. 58; Moundsville v. Ohio R. R. Wis. 328. To remove rocks from a Co. 37 W. Va. 92. An injunction vacant lot : Wheelock v. Noonan, will be granted to open a church : 108 N. Y. 179. To remove obstructions from chimney-pots : Hervey Whitecar v. Michenor, 37 N. J.

bills for specific performance, as where a defendant is required to execute a deed, or to perform some similar act.

781. Injunctions are also divided into preliminary (or interlocutory) and perpetual injunctions. This division has reference simply to the stage of the case when the injunction is issued and to its duration, not to its character otherwise.

Injunctions are frequently issued upon the filing of the bill or soon after, and before the case has been heard and decided upon its merits. Such injunctions are called preliminary or interlocutory injunctions, and they are to continue only until the further order of the court. They are always within the control and discretion of the court, and may, upon motion and proper cause shown at any time during the progress of the cause, be modified or dissolved.¹ If the final decree upon the merits is in favor of the defendant, then as a matter of course all such interlocutory injunctions are dissolved by the decree dismissing the bill.

782. Perpetual or final injunctions are those which are ordered after a final hearing of the case upon its merits. When the decision is in favor of the bill, such an injunction constitutes a part of the final decree, and thus it passes from the control of the court; and, like any other final decree, it can be set aside or modified only upon a rehearing or review of the case. Final injunctions are also called perpetual, because ordinarily they are without limit as to their duration, and are perpetually binding upon the defendant.²

783. PRELIMINARY INJUNCTIONS. — A strong *prima facie* case should be shown in order to justify the interposition of

v. Smith, 1 Kay & J. 392. To replace a bridge torn down by the defendant : *Webber v. Gage*, 39 N. H. 182. To deliver goods at plaintiff's door : *Vincent v. Chicago*, &c. R. R. Co. 49 Ill. 33. To compel the head of a brotherhood of locomotive engineers to issue an order rescinding a former order by which he had directed an unlawful boycott : *Toledo A. A. & N. M. Railway Co. v. Pennsylvania Co.* 54 Fed. Rep. 730. A mandatory injunction may issue

on preliminary hearing : *Brauns v. Glesige*, 130 Ind. 167.]

¹ [*Preston v. Luck*, L. R. 27 Ch. D. 497; *Chetwood v. Brittan*, 2 N. J. Eq. 438; *Brackebush v. Dorsett*, 138 Ill. 167; *Spicer v. Hoop*, 51 Ind. 365; *Roberts v. Anderson*, 7 Johns. Ch. 202.]

² [*Broadbent v. Imperial Gas Co.* 7 De G., M. & G. 436; *Spangler v. City of Cleveland*, 43 Ohio St. 526.]

the court by an injunction before the rights of the parties have been determined by a full trial.¹ The justice of the writ lies in keeping everything *in statu quo* until those rights can be determined.² Where a change in the situation of property, pending suit to determine title to it, may cause great damage to one of the parties, it is certainly equitable not to allow such damage to be done until the legal title of the party is established.

A preliminary injunction should be granted if, upon the evidence as it stands, the plaintiff would be entitled to a final decree.³

To justify a preliminary injunction, then, the plaintiff should prove two things: (1) An apparently good title to the property in dispute,⁴ and (2) That the threatened act of the defendant will result in great or irreparable injury.⁵

784. The term "irreparable injury," however, is not to be taken in its strict literal sense. The rule does not require that the threatened injury should be one not physically capable of being repaired. If the threatened injury would be substantial and serious, — one not easily to be estimated, or

¹ [Rend v. Venture Oil Co. 48 Fed. Rep. 248; American Preservers' Company v. Norris, 43 Fed. Rep. 711.]

² [Fells v. Read, 3 Ves. 70; Blake-more v. Glamorganshire, 1 Myl. & K. 154; Farmers' R. R. Co. v. Reno, &c. Railway Co. 53 Pa. St. 224; Joseph v. McGill, 52 Iowa, 127; Craig v. Lambert, 44 La. Ann. 885. So, when a case is trying in a court of law, equity will often interfere to keep matters *in statu quo* until a decision is reached: Harman v. Jones, Cr. & Ph. 299. Where a case was pending on appeal to the United States Supreme Court, an injunction was granted by the circuit court (the court appealed from) to prevent injury to the property at stake by the cutting down of timber:

Wood v. Braxton, 54 Fed. Rep. 1005.]

³ Challender v. Royle, L. R. 36 Ch. D. 425, 436.

⁴ [Roake v. American Telephone, &c. Co. 41 N. J. Eq. 35; Brown's Appeal, 62 Pa. St. 17; California v. McGlynn, 20 Cal. 233; Pioneer Wood-Pulp Company v. Bensley, 70 Wis. 476; Perry v. Parker, 1 Woodb. & M. 280; McBride v. Commissioners, 44 Fed. Rep. 17; United States v. Southern Pacific Railway, 55 Fed. Rep. 566.]

⁵ [Citizens' Coach Company v. Camden Horse R. R. Co. 29 N. J. Eq. 299; Commonwealth v. Pacific, &c. R. R. Co. 24 Pa. St. 159; United States v. Duluth, 1 Dillon, 469; McHenry v. Jewett, 90 N. Y. 58; Conley v. Fleming, 14 Kan. 381.]

repaired by money, — and if the loss or inconvenience to the plaintiff if the injunction should be refused (his title proving good) would be much greater than any which can be suffered by the defendant through the granting of the injunction, although his title ultimately prevails, the case is one of such probable great or “irreparable” damage as will justify a preliminary injunction.¹

For instance, if one claiming title to an estate, as against one who is in possession under an apparently good title, should attempt to cut down ornamental trees,² demolish buildings, or do other permanent injury to the estate, the court would unhesitatingly enjoin such acts at the suit of the party in possession until the legal title was properly determined. In such a case, each requisite for a preliminary injunction would exist, namely, (1) The plaintiff is in possession under an apparently good title; (2) The injury threatened is a substantial and serious one; (3) The result of refusing the injunction, in case the plaintiff's title is ultimately held good, would be vastly more disastrous to him, by the destruction of ornamental trees, etc., than the granting of the injunction could be to the defendant; for in the latter case the defendant's right to cut down the trees would merely be postponed.

So, also, where the plaintiff was out of possession, but had brought suit for possession, a similar injunction would be granted upon his showing a *prima facie* title.

785. To justify a bill for an injunction it is not necessary

¹ [Upon an application for an injunction all the equities will be considered, and the injury which would be done to the defendant by granting it will be compared with the injury which would result to the plaintiff from withholding it: *Lynch v. Union Institution*, 159 Mass. 306; *Cumberland Telephone Co. v. United Electric Railway Co.* 42 Fed. Rep. 273; *Flippin v. Knaffle*, 2 Tenn. Ch. 238. The fact that restraining the defendant would cause in-

convenience to the public will be weighed, even on final hearing: *English v. Progress Electric Light Co.* 95 Ala. 259.]

² [*Shipley v. Ritter*, 7 Md. 408. In fact the cutting down of mere timber is now sufficient ground for an injunction: *Wood v. Braxton*, 54 Fed. Rep. 1005, *supra*; *Livingston v. Reynolds*, 26 Wend. 115; *Hawley v. Clowes*, 2 Johns. Ch. 122; *Stout v. Curry*, 110 Ind. 514.]

that any injurious act should actually have been done by the defendant. Whenever the intention to do the wrong has clearly been manifested, especially if there has been any conduct showing that the party was preparing to carry his threat into execution, equity at once interferes.¹ But mere idle words² — bluster — will not suffice. No one, however, can complain that the court has taken him at his word.

Nor is it any sufficient answer to the bill for the defendant to come in and say that he no longer harbors his unlawful purpose, but has abandoned it. Such death-bed repentance is too late in a court of equity. The court will not leave a plaintiff to the goodwill of a defendant who has once shown an intention to disregard his rights, but will by its decree take care that the defendant's good professions are carried out.

I propose now to glance at the leading instances in which this remedy of injunction is applicable, and the circumstances under which it will be granted. First, it is granted for the protection of rights relating to real estate.

786. WASTE. — Waste is a permanent injury to real estate committed by one having some title less than the whole, in derogation of the rights of those having the remaining interest. There must be privity of estate. If the injury is done by a stranger, then it is trespass or nuisance, as distinguished from waste.³

Waste, then, may be committed by a tenant for life or

¹ *Woodworth v. Stone*, 3 Story 505; *Head v. James*, 13 Wis. 641; *Rep. 749*; *Poppenhusen v. The New York Gutta Percha Comb Co.* 4 Blatchf. 184; *Sherman v. Nutt*, 35 Fed. Rep. 149; [*McArthur v. Kelly*, 5 Ohio, 139, 154; *Owens v. Crosett*, 105 Ill. 354; *Milan Steam Mills v. Hickey*, 59 N. H. 241.]

² [Neither apprehension of a trivial injury nor ungrounded apprehension of a real injury are sufficient: *Blatchford v. Chicago, &c. Dock Co.* 22 Ill. App. 376; *Genet v. Delaware, &c. Canal Co.* 122 N. Y.

Potter v. Saginaw Street Railway, 83 Mich. 285. See, also, *Thomas v. Musical, &c. Union*, 121 N. Y. 45.

An injunction will be granted, if cause for it existed when the bill was filed, although the defendant has since ceased to commit or to threaten the acts complained of: *United States v. Workingmen's Amalgamated Council of New Orleans*, 54 Fed. Rep. 994.]

³ [*Duvall v. Waters*, 1 Bland, 569; *Mogg v. Mogg*, Dick. 670.]

years as against the reversioner or remainder-man,¹ and by one tenant in common as against his co-tenant.²

It may also be committed by a mortgagor as against the mortgagee, or by the latter, if in possession, as against the mortgagor. If the mortgagor, while in possession, undertakes, by the demolition of buildings, the cutting down of timber, or other destructive acts, to diminish the value of the estate and consequently the value of the security, it is waste as against the mortgagee, and equity will protect the latter by an injunction.³

So, on the other hand, inasmuch as the mortgagee, until his mortgage is foreclosed, has a right merely to the rents and profits of the estate for the payment of his debt, he can do nothing to injure or substantially to alter it, and at the suit of the mortgagor he will be enjoined from so doing.

787. TRESPASS, as distinguished from waste, is some direct injury to real estate committed by a stranger. The cases in which an injunction will be granted against trespasses may be embraced in two classes, namely: (1) Those where the injury is substantial and permanent, or else cannot be estimated exactly in money;⁴ (2) Where the tres-

¹ [Denny v. Brunson, 29 Pa. St. 382. A tenant whose term was about to expire was enjoined from ploughing up the meadow land: Chapel v. Hull, 60 Mich. 167. A lessee was enjoined from taking out machinery: Poertner v. Russel, 33 Wis. 193. So it is waste for a lessee to use the premises for a purpose inconsistent with the lease, as by converting a post-office into a bar-room: Maddox v. White, 4 Md. 72; or a dry-goods shop into an auction-room: Steward v. Winters, 4 Sandf. Ch. 587. An insolvent debtor was enjoined, at the suit of an attaching creditor, from committing waste on the premises attached: Camp v. Bates, 11 Conn. 51.]

² [Stout v. Curry, 110 Ind. 514, the co-tenant, defendant, being in-

solvent. But courts are slow to restrain one co-tenant at the suit of another: Hole v. Thomas, 7 Ves. 589.]

³ [See *supra*, p. 358. So an insolvent vendee will be restrained at the suit of a vendor who has a lien for unpaid purchase-money: McCaslin v. The State, 44 Ind. 151.]

⁴ [Smith v. Rock, 59 Vt. 232; Gilbert v. Arnold, 30 Md. 29. Such an injury is the foreclosure in the busy season of a mortgage upon a canning factory: Dudley v. Hurst, 67 Md. 44. Or the closing of a right of way to the plaintiff's land: Lathrop v. Elsner, 93 Mich. 599. A defendant was restrained from appropriating the plaintiff's gas main: Poughkeepsie Gas Co. v. Citizens'

passes are repeated or continuous, involving recourse to a multiplicity of suits,¹ or vexation and annoyance.²

788. It is not a single act of trespass, unless indeed it be permanent in its character or consequences, that will induce a court of equity to interpose; nor will equity interpose to enjoin acts of a temporary nature, unless they are so often repeated as to become a serious annoyance. If A establishes a private way over his own land for his own convenience, and an adjoining owner B occasionally uses it by passing and re-passing over it, equity will not enjoin B, but will leave A to recover his damages at law for the trespass. Here the injury, if any, is slight and temporary, and can be compensated in damages.³

But if B unlawfully builds a structure over the whole or a part of this way, thus permanently obstructing it, equity will enjoin him, and by its writ of mandatory injunction will compel him to remove the trespassing structure.⁴ In one case water-pipes had been laid under a highway, the soil of which belonged to the plaintiff.⁵

Gas Co. 89 N. Y. 493. And from destroying a garden: *Watson v. City of Mineral Point*, 39 Wis. 160. And from destroying growing walnut-trees: *Thatcher v. Humble*, 67 Ind. 444. So where the act of the defendant impaired the use which the owner had been accustomed to make of his property: *Hooper v. Dora Coal Mining Co.* 95 Ala. 235; *Baltimore Belt R. R. Co. v. Lee*, 75 Md. 596. It is said that a private person applying for an injunction to restrain a corporation, such as a railroad, from entering illegally on his land, is not required to make out a case of irreparable damage. High on Injunctions, § 622; *Pratt v. Roseland Railway Co.* 50 N. J. Eq. 150. See, also, *Western Railway of Alabama v. Alabama Grand Trunk R. R.* 96 Ala. 272.]

¹ [*Salem, &c. Mills v. Stayton, &c. Canal Co.* 38 Fed. Rep. 146; *Lem-*

lack v. Nye, 47 Ohio St. 336; *Williams v. N. Y. Central R. R. Co.* 16 N. Y. 97, 111; *Newaygo Co. v. Chicago, &c. R. R. Co.* 64 Mich. 114; *Smithers v. Fitch*, 82 Cal. 153.]

² [*Scudder v. Trenton, &c. Falls Co.* 1 N. J. Eq. 694; *Griffith v. Hilliard*, 64 Vt. 643. In *Murdock v. Walker*, 152 Pa. St. 595, the defendants, striking workmen, were restrained from annoying and intimidating men who had taken their places.]

³ *Washburn v. Miller*, 117 Mass. 376.

⁴ *Nash v. N. E. Mutual Life Insurance Co.* 127 Mass. 91; *Cadigan v. Brown*, 120 Mass. 493; *Creely v. Bay State Brick Co.* 103 Mass. 514; *London & North Western Railway v. Lancashire & Yorkshire Railway*, L. R. 4 Eq. Cas. 174.

⁵ *Goodson v. Richardson*, L. R. 9 Ch. App. 221.

789. **REPEATED TRESPASSES.** — As I have intimated already, a trespass, although temporary in its character, may by its frequent repetition become so annoying and oppressive as to call for the interposition of a court of equity. Moreover, whenever the frequency of the trespass would force the plaintiff, in a just vindication of his rights at law, to a multiplicity of suits, repeating suit after suit as the trespass was repeated, equity commends as the better course a resort to its aid.

In the case of an occasional trespass, temporary in its results, the party is left to his remedy at law.¹ If, therefore, A occasionally walks through the grounds of B without his consent, or if he cuts down a single tree in his forest, equity will not interpose. But if A should make a practice of walking across the lawn or garden of B, thereby annoying B and his family, equity should, and I think would, enjoin him. So, although equity will not interfere if A, upon occasion, wrongfully cuts down a tree on his neighbor's land, yet if this trespass should be repeated, or if A's conduct showed an intention to repeat it indefinitely, the same reason for equitable interference would exist.²

790. **NUISANCE.** — Trespass, as we have seen, is some direct injury to and upon the property itself. Nuisance, as distinguished from trespass, may be defined as an unlawful act which causes injury to a person in the enjoyment of his estate, unaccompanied by an actual invasion of the property itself. Cutting down shade trees is a trespass. Establishing in the immediate vicinity any works, the unwholesome

¹ [Examples: obstructing a railroad track by moving a house along a public street: *Fort Clark, &c. Co. v. Anderson*, 108 Ill. 64. Erecting an iron awning: *Whalen v. Dalashmutt*, 59 Md. 250. Tearing down a fence: *Smith v. City of Oconomowoc*, 49 Wis. 694. The court will not assume jurisdiction merely because the defendant is not able to pay such damages as might be recovered at law: *Morgan v. Palmer*, 48 N. H. 336.]

² In *Allen v. Martin*, L. R. 20 Eq. Cas. 462, the owners in fee simple of the ornamental gardens in Euston Square, London, which the householders in that square had a right to use and enjoy, obtained an injunction against the agent of the householders, and a contractor employed by him, restraining them from erecting hoardings, and from marring the gardens in other ways.

vapors from which poison the atmosphere and kill the trees, would be a nuisance.

As in the case of trespass so in that of nuisance, the jurisdiction in equity depends upon the character of the nuisance, as to whether it is permanent and continuous, or merely casual and temporary. In the former case, equity will interpose to abate or permanently to enjoin the nuisance; in the latter case, it leaves the party to his damages at law. In a word, the injury must be either (1) permanent and irreparable,¹ or (2) continually recurring,² in order to call for equitable interference.

Public and Private Nuisances.

791. It is important to notice the well-settled distinction between public and private nuisances. A public nuisance is an injury to all mankind, or to the public generally, or to the whole of some community. A private nuisance is an injury to one or more particular individuals in distinction from

¹ [McCord v. Iker, 12 Ohio, 387; Attorney-General v. Sheffield Gas Co. 3 De G., M. & G. 304; Lyon v. McLaughlin, 32 Vt. 423; Hawley v. Beardsley, 47 Conn. 571; Haskell v. Thurston, 80 Me. 129; Burnham v. Kempton, 44 N. H. 78; Manufacturing Co. v. Warren, 77 Me. 437; Tuttle v. Church, 53 Fed. Rep. 422; Blaine v. Brady, 64 Md. 373.]

² [Proprietors of Maine Wharf v. Proprietors of Custom House Wharf, 85 Me. 175; Indianapolis Water Co. v. American Strawboard Co. 53 Fed. Rep. 970. The following are anomalous cases of injunction: *In re Lyman*, 55 Fed. Rep. 29, the custodian of the Federal building in the city of New York was enjoined from dispossessing the United States District Court from the rooms occupied by the court. In *Brass & Iron Works v. Payne*, 50 Ohio St. 115, a retiring partner was re-

strained from using the partnership name as a trade-mark. In *Rutland Electric Light Co. v. Marble City Electric Light Co.* 65 Vt. 377, the defendant was enjoined from erecting poles in such a manner as to interfere with poles and wires previously erected, under authority from the municipality, by the plaintiff company. In *Allen v. Buchanan*, 97 Ala. 399, the defendant was enjoined from prosecuting a suit in a Louisiana court, his object being to seize a fund which the courts of Alabama had adjudged to be exempt from seizure. A court of equity will not interfere by injunction to determine the validity of the election or appointment of a public officer, a writ of quo warranto being a complete remedy in such a case: *Burgess v. Davis*, 138 Ill. 578; *Johnston v. Garside*, 65 Hun, 208; *Callan v. Fire Commissioners*, 45 La. Ann. —.]

men in general. In the former case, as the injury is to the public generally, the remedy must be sought in behalf of the public by the attorney-general,¹ by indictment or information or other proper proceeding, and no suit by an individual can be maintained.²

792. But if this public nuisance has for any reason worked special damage to an individual, not shared by him with the rest of the community, then he has a right to his private remedy on that account. Thus, for example, if one should unlawfully place some permanent obstruction on a public highway, this would be an injury to the public right to the unobstructed use of the highway, and the only remedy would be by indictment or other suitable proceeding in the name and behalf of the people, represented by the proper law officer. But if a person ignorant of the obstruction were lawfully travelling at night (let us suppose), and should receive an injury from the obstruction, for this special damage he would be entitled to his remedy against the wrongdoer.

So, also, where one by exercising a noxious or unwholesome trade injures private property or health, this is a private nuisance for which each individual sufferer is entitled to his legal remedy, although at the same time the injury may be so widespread, and the sufferers so numerous, that it amounts also to a common or public nuisance subjecting the offender to an indictment.

¹ [Newark Aqueduct Board v. Passaic, 45 N. J. Eq. 393; Attorney-General v. Colney Hatch Asylum, L. R. 4 Ch. App. 146; The People v. Vaudebult, 28 N. Y. 396.]

² [Bigelow v. Hartford Bridge Co. 14 Conn. 565; Zabriskie v. Jersey City, &c. R. R. Co. 13 N. J. Eq. 314; Swanson v. Miss. River Boom Co. 42 Minn. 532; Palmer v. Logansport Gravel Road Co. 108 Ind. 137; Bosworth v. Norman, 14 R. I. 521; Kuehn v. City of Milwaukee, 83 Wis. 583. Obstructing one of two highways which give the plaintiff access to his premises does not constitute a private nuisance; it would be such if both highways were obstructed: Sargent v. George, 56 Vt. 627. The construction of a street railroad in a highway is not a private nuisance: Van Horne v. Newark Railway Co. 48 N. J. Eq. 332. See, also, Adler v. Metropolitan Elevated Railway Co. 138 N. Y. 173; Pittsburgh Co. v. Cheevers, 44 Ill. App. 118. Breach of the Sunday or of the liquor law is commonly a public and not a private nuisance: Sparhawk v. Union Railway Co. 54 Pa. St. 401; Seagar v. Kankakee County, 102 Ill. 669.]

Whenever the nuisance occasions actual damage either to the property or health of individuals, a private remedy exists in favor of the individual.¹

Examples of Private Nuisance.

793. INJURY TO LATERAL SUPPORT. — Every owner of land has a right to the lateral support of the adjoining soil, so that the natural surface of his land may be preserved. And therefore, if the owner of the adjoining soil digs on his own premises so near to the dividing line as to deprive his neighbor's land of lateral support and it consequently falls in, this is a violation of his neighbor's right, and a nuisance against which equity will enjoin.²

794. But this right of lateral support extends only to the soil in its natural condition.³ If A has placed a building on his own land, the adjacent owner, B, is not obliged to furnish lateral support to the additional weight of this building. If, therefore, B excavates his own soil, and A's adjoining land and house tumble in, B will not be liable if the falling in was due to the added weight of the building. If, however,

¹ The distinctions on this subject were admirably stated by Chief Justice Bigelow in *Wesson v. Washburn Iron Co.* 13 Allen, at p. 101.

[The following are cases of private nuisance: Where a street railway caused special damage to the plaintiff: *Milhau v. Sharp*, 27 N. Y. 611. So where a street, in which the plaintiff owned the fee to the middle thereof, was obstructed: *Higbee v. Camden R. R. Co.* 19 N. J. Eq. 276; *Perkins v. Moorestown Turnpike Co.* 48 N. J. Eq. 499. So where a wharf was built in such a manner as to shut in the plaintiff's wharf: *Frink v. Lawrence*, 20 Conn. 117. So where public land was built upon in such a way that the plaintiff was deprived of ingress to his own premises: *Williams v. Smith*, 22 Wis. 594; *Ross v. Thompson*, 78 Ind. 90. So where nitroglycerine was stored in a place where it en-

dangered the plaintiff's property, although such storing was also contrary to statute: *People's Gas Co. v. Tyner*, 131 Ind. 277. See, also, *Pennsylvania v. Wheeling, &c. Bridge Co.* 13 How. 518; *Page v. Mille Lacs Lumber Co.* 53 Minn. 492. A city commonly has the right to bring suit for removing nuisances affecting the health or convenience of its citizens, or tending to render it liable for damages in its corporate capacity: *Pine City v. Munch*, 42 Minn. 342; *Springfield v. Connecticut R. R. Co.* 4 Cush. 63; *Burlington v. Schwarzman*, 52 Conn. 181.]

² [*Trowbridge v. True*, 52 Conn. 190.]

³ [*Busby v. Holthaus*, 46 Mo. 161; *Lasala v. Holbrook*, 4 Paige, 169; *Louisville R. R. Co. v. Bonhaye*, 94 Ky. —.]

B's excavation was of such a nature that A's adjoining land would have fallen in of its own weight, it is a nuisance for which B is liable.¹

795. The rule of damages which a plaintiff may recover in such a case is not uniform. Some English cases have held that the adjacent owner may recover for the injury to his building as well as to his land; but the rule as long settled in Massachusetts is that in the absence of proof of negligence he can recover only for injury to the soil, and not for injury to any artificial structure which he may have put upon it.²

796. LIGHTS AND WINDOWS. — Light and air are in one sense common property. The owner of a house may construct it with as many windows as he desires, and thus secure all the light and air that he can. But his neighbor has the corresponding right to build his house in such position on his own land as he chooses, and the result of this may be to darken the windows of the house adjoining. But this is *damnum absque injuriâ*. The neighbor has committed no unlawful act, and the first builder has no right to complain. But if A, the first builder, has enjoyed for twenty years or more the unobstructed passage of light to his windows, then he has acquired by prescription (some courts have held) the right to its unobstructed enjoyment, and if B thereafter erects any structure which substantially diminishes A's light and injures the enjoyment of his estate, it is a nuisance which equity will require him to remove.

797. Such is the law in England, and such was the law at one time in Massachusetts; but this doctrine was denied in other States, and it is now entirely repudiated in Massachusetts. It is settled in that State that the owner of a house does not acquire by lapse of time any prescriptive right, as against the owner of the adjacent land, to have his windows

¹ The cases are cited in *Gilmore v. Driscoll*, 122 Mass. 199.

² *Gilmore v. Driscoll*, 122 Mass. 199; [*Charless v. Rankin*, 22 Mo. 566; *McGuire v. Grant*, 25 N. J. Law, 356. Whether the right to lateral support may be acquired by twenty years' use, query. To the

effect that it may, see *Humphries v. Brogden*, 12 Ad. & El. (N. S.) 739; *Lasala v. Holbrook*, 4 Paige, 169. *Contra*, and it would seem better on principle: *Richart v. Scott*, 7 Watts, 460. See, also, *Gilmore v. Driscoll*, *supra*.]

unobstructed. In *Keats v. Hugo*,¹ the court quote with approval what was said in the leading case of *Parker v. Foote*,² namely: "The English doctrine of acquiring a right to light by prescription is without foundation in principle, not adapted to the existing state of things in the United States, and could not be applied in the growing cities and villages of this country without working the most mischievous consequences."³

Nor is a grant of such easement to be implied from the grant of a house having windows overlooking land retained by the grantor.⁴

798. AIR. — In a general way, it may be said that every one is entitled to the enjoyment of the air undefiled by his neighbor.

It is also true as a general proposition that whoever, by means of noisome or injurious works or otherwise, renders the air so offensive or unwholesome as seriously to injure another in the enjoyment of his estate, commits a private nuisance which equity will enjoin.

Of course, in a populous community this right to pure air must be taken in a very modified sense, and subject to the absolute necessities and requirements of large towns and cities.⁵ Nevertheless, so far as the protection of dwelling-houses is concerned, the rule exists in full force, subject to this single modification: it is not every slight or casual annoyance or inconvenience which a court of equity will take notice of; but the court will suppress any trade or business by which the air of a dwelling-house is rendered continuously, or in any substantial degree, unwholesome or offensive.⁶

¹ 115 Mass. 204.

² 19 Wend. 309.

³ [*Western Granite & Marble Co. v. Knickerbocker*, 103 Cal. —; *Cherry v. Stein*, 11 Md. 1; *Hubbard v. Town*, 33 Vt. 295; *Holley v. Security Trust Co.* 5 Del. Ch. 578; *Pierre v. Fernald*, 26 Me. 436; *Lapere v. Luckey*, 23 Kans. 534; *Guest v. Reynolds*, 68 Ill. 478, overruling *Gerber v. Grabel*, 16 Ill. 217.]

⁴ *Keats v. Hugo*, *supra*; [*Morri-*

son v. Marquardt, 24 Iowa, 35; *Mullen v. Stricker*, 19 Ohio St. 135; *Rennyson's Appeal*, 94 Pa. St. 147; *Keiper v. Klein*, 51 Ind. 316. There are authorities the other way: *Phillips v. Low* [1892], 1 Ch. 47. See *Sutphen v. Therkelson*, 38 N. J. Eq. 318, where the cases are collected.]

⁵ [*Rhodes v. Dunbar*, 57 Pa. St. 274. See *infra*, p. 438.]

⁶ *Fay v. Whitman*, 100 Mass. 76.

"What makes life less comfortable and causes sensible discomfort and annoyance is a proper subject of injunction."¹

If the annoyance is such as materially to interfere with the ordinary comfort of human existence, equity will enjoin it.²

799. This annoyance may arise from unwholesome vapors,³ or from disagreeable although not positively unwholesome odors,⁴ or from smoke, or from excessive noise and vibration.⁵ "Nuisance by noise is emphatically a question of degree;"⁶ but whenever it amounts to a serious and continuous disturbance it will be enjoined.⁷

The nuisance may arise from carrying on a manufacturing business in which a steam-engine or hammer is employed,⁸ or from the pestle and mortar of a confectioner;⁹ or from a circus, as in *Inchbald v. Robinson*;¹⁰ or from a concert-garden, as in *Walker v. Brewster*.¹¹

¹ *Fleming v. Hislop*, L. R. 11 App. Cas. 686, 697.

² *Crump v. Lambert*, L. R. 3 Eq. 409. [But the inconvenience must be "more than fanciful, more than one of mere delicacy or fastidiousness, . . . an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people : " *Walter v. Selfe*, 4 De G. & S. 315, 322. See, also, *Tuttle v. Church*, 53 Fed. Rep. 422. Hence an undertaker's shop is not, in the legal sense, a nuisance : *Westcott v. Middleton*, 43 N. J. Eq. 478.]

³ [*Barnes v. Hathorn*, 54 Me. 124; *Meigs v. Lister*, 23 N. J. Eq. 199. A slaughter-house is *prima facie* a nuisance : *Bushnell v. Robeson*, 62 Iowa, 540. In *Boston Ferrule Co. v. Hills*, 159 Mass. 147, the plaintiff, doing business on a lower floor, obtained an injunction to restrain the defendant, on the floor above, from allowing sand and the fumes

of noxious acids to descend through holes in the floor (made for the passage of belting), thus injuring the plaintiff's goods. Even though the injury be to ornamental trees only, an injunction will be granted : *Campbell v. Seaman*, 63 N. Y. 568.]

⁴ [*Ross v. Butler*, 19 N. J. Eq. 294; *Adams v. Ohio Falls Car Co.* 131 Ind. 375.]

⁵ *Crump v. Lambert*, *supra*; *Wesson v. Washburn Iron Co.* 13 Allen, 95, *supra*; [*Dittman v. Repp*, 50 Ind. 516; *Fish v. Dodge*, 4 Denio, 311; *Demarest v. Hardham*, 34 N. J. Eq. 469.]

⁶ *Gaunt v. Fynney*, L. R. 8 Ch. App. 8, 12.

⁷ [So, also, it will be enjoined when the nuisance appreciably affects the value of the land : *Hennessy v. Carmony*, 50 N. J. Eq. 616.]

⁸ *Goose v. Bedford*, 21 W. R. 449; *Wesson v. Washburn Iron Co.* *supra*.

⁹ *Sturges v. Bridgman*, L. R. 11 Ch. D. 852.

¹⁰ L. R. 4 Ch. App. 388.

¹¹ L. R. 5 Eq. 25.

800. The ringing of bells, if it be done at unreasonable hours or for an unreasonable time, whether for purposes of devotion or of business, will be restrained.¹

Here, also, it is a question of degree. It is a question, namely, whether the noise is such as seriously to disturb people having no more and no less than the ordinary susceptibility to noise, without regard to its effect upon nervous or sick persons.²

In Massachusetts the ringing of bells by factories and other like establishments is regulated by statute, act of 1883, ch. 84, which authorizes the board of aldermen in a city or the selectmen in a town to designate when and in what manner bells may be rung.

801. Whether a particular manufacture or business is a nuisance or not depends very largely upon the place where it is situated. What would be a nuisance in one locality would not be in another.³

If one attempts to set up a noisy or unwholesome or offensive business in a neighborhood devoted to, or appropriate for, residences, he has come where he has no right to come, and the intrusion is unwarrantable. If, however, the place selected is one already devoted to and proper for such business, no objection can be taken unless the new business is carried on in such a manner as substantially to create a new nuisance. Although some noise, or smoke, or odor may proceed from establishments already existing, yet if the new manufacturer has increased either of these to such a material degree as to render habitations there unwholesome or uncomfortable, it is a nuisance.⁴

Nor can one simply by establishing a nuisance in an unoc-

¹ *Soltau v. De Held*, 2 Sim. (N. S.) 133 (the case of a church); *Davis v. Sawyer*, 133 Mass. 289 (the case of a factory).

² *Rogers v. Elliott*, 146 Mass. 349.

³ *Sturges v. Bridgman*, L. R. 11 Ch. D. 852, *supra*; [*Cleveland v. Citizens' Gas Light Co.* 20 N. J. Eq. 201; *Robinson v. Baugh*, 31 Mich. 290; *Reichert v. Geers*, 98

Ind. 73. Thus the building of a powder house was enjoined in one situation (*Wier's Appeal*, 74 Pa. St. 230), but permitted in another: *Dilworth v. Robinson*, 91 Pa. St. 247.]

⁴ *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cases 642; *Crump v. Lambert*, L. R. 3 Eq. 409, *supra*; [*Euler v. Sullivan*, 75 Md. 616.]

cupied territory acquire a right to maintain it as against those who subsequently come there to live. Otherwise it might be in his power to desolate a large territory and render it valueless.¹

802. AS TO WATER. — The right of flowing water is one of the most important incidents to the ownership of land, and one to which the protection of an injunction is often of the utmost consequence.

Every riparian proprietor² is entitled to have the water come to him according to its natural flow, undiminished except from its reasonable use by the upper proprietors for domestic and farming or manufacturing purposes. If any one above diverts the stream so that it fails to come to him at all, or is improperly diminished in volume,³ or if he pollutes it or renders it less fit for use by man or beast by throwing into it improper substances,⁴ in every such case a private nuisance is committed which equity will restrain. It is obvious that the permanent diversion or diminution or pollution of water is an injury irreparable in its character, and not easily estimated in or compensated by money.⁵

Where, however, there has been but a single act of diversion, not continuous in its nature, equity will not grant relief, but will leave the party to his remedy at law.⁶

¹ *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cases 642, *supra*; *Sturges v. Bridgman*, L. R. 11 Ch. D. 852, 865, *supra*; [*King v. The Morris & Essex R. R. Co.* 18 N. J. Eq. 397; *Wier's Appeal*, 74 Pa. St. 230.]

² [It is not necessary that the plaintiff should own the river-bed; it is sufficient if his land touches the flow of the stream: *Indianapolis Water Co. v. American Strawboard Co.* 53 Fed. Rep. 970.]

³ [*Webb v. Portland Manufacturing Co.* 3 Sumner, 189; *Corning v. Troy Iron, &c. Factory*, 40 N. Y. 191; *Lyon v. McLaughlin*, 32 Vt. 423; *Bitting's Appeal*, 105 Pa. St. 517; *Morrill v. St. Anthony Falls Co.*

26 Minn. 222; *Higgins v. Fleming-ton Co.* 36 N. J. Eq. 538. It makes no difference that the source of the water is on the defendant's land: *Howe v. Norman*, 13 R. I. 488.]

⁴ [*Goldsmid v. Tunbridge Wells Commissioners*, L. R. 1 Ch. App. 349; *Clowes v. Staffordshire Co.* L. R. 8 Ch. App. 125; *Canfield v. Andrew*, 54 Vt. 1; *Chapman v. City of Rochester*, 110 N. Y. 273.]

⁵ *Harris v. Mackintosh*, 133 Mass. 228. In *Moulton v. Newburyport Water Co.* 137 Mass. 163, one riparian proprietor undertook to withdraw half of the water running in a brook, and to dispose of it as merchandise. The court restrained him.

⁶ *Parker v. Winnipisseogee Lake*

803. So, also, if an upper riparian proprietor holds back the water entirely for a while, and then suddenly lets it all down so as to injure the proprietor below, that is a nuisance which equity will enjoin, instead of leaving the party to his action of trespass.¹

804. So, again, a land-owner has the right to have the water which percolates through the soil to his own well from the adjoining land undefiled; and if his neighbor pollutes it, it is a nuisance.²

805. Important rights, beside the natural right to flowing water, may be acquired by grant or prescription, such as the right to store water for water-power and mill purposes, and in respect to these rights the aid of a court of equity is often vital.

It is obvious that when a mill-owner, having a right to the flow of water to his dam and mill, has established a factory dependent for its motive power upon the water,

Cotton Co. 2 Black, 545; [Westbrook Manufacturing Co. v. Warren, 77 Me. 437.]

¹ [So equity will interfere where a lower proprietor has dammed the water to such an extent as to overflow and injure land above him: Bemis v. Upham, 13 Pick. 169; Moore v. Chicago, Burlington, & N. R. Co. 75 Iowa, 263; McCormick v. Horan, 81 N. Y. 86.]

² Ballard v. Tomlinson, L. R. 29 Ch. D. 115, reversing the decision in 26 Ch. D. 194. [There is, however, a distinction between water which percolates and water which flows in a defined and visible channel. As to water percolating from a neighbor's land, no prescriptive right to it can be acquired; the neighbor can cut it off at any time, no matter how long it may have been enjoyed: Chasemore v. Richards, 7 H. L. Cas. 349; Ocean Grove Association v. Commissioners, &c. 40 N. J. Eq. 447; Lybe's Appeal,

106 Pa. St. 626. It has indeed been held that the motive is material, that if the water is cut off maliciously equity will grant an injunction. See Chesley v. King, 74 Me. 164; and there is a dictum to the same effect in Greenleaf v. Francis, 18 Pick. 117. But this is not the law. See Chatfield v. Wilson, 28 Vt. 49; Tyner v. People's Gas Co. 131 Ind. 408; Paine v. Chandler, 134 N. Y. 385. In Hougau v. Milwaukee, &c. R. R. Co. 35 Iowa, 558, it was held that the defendant corporation acquired the right to sink a well and cut off the plaintiff's supply of percolating water, although the defendant owned merely "the right of way over and through the land for all purposes connected with the construction, use, and occupation of its railway." The same rule which is laid down in regard to percolating water applies also to natural gas and petroleum: People's Gas Co. v. Tyner, 131 Ind. 277.]

any one who undertook by diversion of the water or otherwise to deprive him of this power, might inflict irreparable injury; and therefore in all such cases, where the title of the mill-owner fully appears, equity hastens to prevent the injury by a preliminary or final injunction, as the case may be.¹

806. Where several persons have separately contributed to create the nuisance, a bill will lie against all, although the act of each, if taken alone, would be inappreciable. At law an action against each would be necessary.²

¹ [Winnipisseogee Lake Co. v. Riverdale Park Co. v. Westcott, 74 Worster, 29 N. H. 433; Hoy v. Md. 311.]
² Thorpe v. Brumfitt, L. R. 8 Ch. App. 650; The Lockwood Co. v. Sterrett, 2 Watts, 327; Shields v. Arndt, 4 N. J. Eq. 234; Burk v. Simonson, 104 Ind. 173; Eckerson Lawrence, 77 Me. 297; The Mining Debris Case, 8 Sawyer, 628, v. Crippen, 110 N. Y. 585; Wall v. Cloud, 3 Humph. (Tenn.) 181; s. c. 9 Sawyer, 441.

CHAPTER XXIX.

INJUNCTION (CONTINUED).

807. EQUITY not only compels, as we have seen, the specific performance of contracts, but it also, by injunction, restrains their violation so far as this can be done, and provided that a suit at law would not furnish an adequate remedy.¹ There are three important classes of cases relating to personal property or personal services, in which a court of equity will thus interpose:—

(1) Where the owner of a patent has agreed to give the plaintiff an exclusive license to make or sell the article manufactured under it, equity will enjoin him from so licensing a third person, or from delivering the patented articles to others.²

(2) Where one has contracted not to engage in a particular trade or calling, or in a particular business, within a

¹ The Singer Sewing Machine Co. v. The Union Buttonhole, &c. Co. 1 Holmes, 253; Chicago & Alton Ry. Co. v. New York, L. E. & W. R. R. Co. 24 Fed. Rep. 516; [Joy v. St. Louis, 138 U. S. 1; Rock Island, &c. Ry. Co. v. Dimick, 144 Ill. 628; Sewickley School District v. Ohio Valley Gas Co. 154 Pa. St. 539. Equity will restrain the breach of a covenant in a lease or deed: Buckle v. Fredericks, L. R. 44 Ch. D. 244; Rowland v. Miller, 139 N. Y. 93; Peck v. Conway, 119 Mass. 546. See, also, Clark v. Glidden, 60 Vt. 702. For cases where the court refused to enjoin, on the ground that there was a sufficient remedy at law, see Steinau v. Gas Co. 48 Ohio St. 324; Bur-

don Co. v. Leverich, 37 Fed. Rep. 67. As a rule, the breach of a contract will not be enjoined if specific performance of it would not be enforced: Fothergill v. Rowland, L. R. 17 Eq. 132; Chicago Gas Co. v. Town of Lake, 130 Ill. 42. Thus, since a court of equity will commonly refuse to decree specific performance of a contract for personal services, it will also refuse to enjoin the violation of such a contract: Healy v. Allen, 38 La. Ann. 867. But see the cases *infra*.]

² Singer Sewing Machine Co. v. The Union Buttonhole, &c. Co. *supra*. [See, also, Connelly Manufacturing Co. v. Wattles, 49 N. J. Eq. 92; Cornwall v. Sachs, 69 Hun, 283.]

certain territory, or for a certain period, equity will enjoin a breach of his contract.¹

(3) Where one has engaged to perform certain services for the plaintiff, and not to enter any competing service, equity will enjoin him from entering such service, although it cannot compel him to perform the services for the plaintiff.²

¹ *Ropes v. Upton*, 125 Mass. 258. [Thus equity will enjoin the breach of a physician's contract not to practice within a certain radius: *McClurg's Appeal*, 58 Pa. St. 51. And so of an agreement not to resume a certain publication in a particular State: *Beal v. Chase*, 31 Mich. 490. And so of a contract not to ship poultry from Philadelphia to New York or Washington: *Richardson v. Peacock*, 26 N. J. Eq. 40. And so of a contract not to keep a millinery shop in a certain town: *Morgan v. Perhamus*, 36 Ohio St. 517. And so of an agreement not to keep a hotel in a particular city: *Welz v. Rhodius*, 87 Ind. 1. Equity will decree specific performance of a bargain to sell trade secrets, and not to engage in the business of manufacturing according to them: *Jarvis v. Peck*, 10 Paige Ch. 118. And so where the agreement was not to carry on a particular manufacture anywhere in Europe: *Leather Cloth Co. v. Lorisont*, 39 L. J. (N. S.) Ch. 86. See, also, *Rogers v. Maddocks* [1892], 3 Ch. 346; *Mills v. Dunham* [1891], 1 Ch. 576. In *Perls v. Saalfeld* [1892], 2 Ch. 149, it was held that an agreement by the defendant not to engage in *any* business without the plaintiff's consent, within fifteen miles of the Royal Exchange in London, for a period of three years, was void. See, also, *Greenhood on Public Policy*, p. 683.

In these cases the covenantee is

not deprived of his right to an injunction by the fact that the contract includes a penalty for its non-performance, unless it clearly appears that the sum named is intended, not really as a penalty, but as liquidated damages: *Greenhood on Public Policy*, 763; *Martin v. Murphy*, 129 Ind. 464. If liquidated damages are thus provided for, an injunction will not be granted, even though the defendant is insolvent: *Dills v. Doeblor*, 62 Conn. 366.]

² See the cases *supra*. [The English doctrine on this subject has been changed twice. It was held at first that equity would not enjoin the defendant from rendering to a third person the services in question, even though he had expressly stipulated not to do so: *Kemble v. Kean*, 6 Sims. 333. But *Kemble v. Kean* was overruled by *Lumley v. Wagner*, 1 De G., M. & G. 604, where the defendant was enjoined from rendering such competitive service. In that case the defendant had made a negative covenant (*i. e.* a covenant not to perform the services in question for a third person), but certain dicta in the opinion were apparently to the effect that the result would have been the same even had there been no negative covenant. Accordingly, in the absence of such a covenant, the defendant was nevertheless restrained in *Montague v. Flockton*, L. R. 16 Eq. 189, — the argument

The cases in which equity interferes by injunction, for the violation of rights relating to personal property, are confined principally to rights in letters-patent, trade-marks, copyrights, and manuscripts.

Injunctions in Patent Suits.

808. Whenever a bill is brought for infringement of a patent and a final decree is rendered for the plaintiff, if the patent is still in force, a perpetual injunction is always granted as a matter of course.¹ "Perpetual" in this connection means until the expiration of the patent.

being that the negative covenant not to act for a third person was implied in the covenant to act for the plaintiff. See, also, *Stiff v. Cassell*, 2 Jur. (N. S.) 348. But in the recent case of *Whitwood Chemical Co. v. Hardman* [1891], 2 Ch. 416, *Montague v. Flockton* was in turn overruled, and the court held that, in the absence of an express negative covenant, the defendant could not be restrained from rendering to a third person the services contracted for by the plaintiff. As a rule, the American courts have laid down the same principle upon which the last-named English case was decided. See *Burton v. Marshall*, 4 Gill (Md.), 487; *Hahn v. Concordia Society*, 42 Md. 460, 3 Pomeroy's Eq. § 1343; *Greenhood on Public Policy*, p. 761. Some of our courts, however, have adopted the rule acted upon in *Montague v. Flockton*, and have restrained the defendant even in the absence of a negative covenant. See *McCaul v. Braham*, 21 Blatchf. 278, s. c. 16 Fed. Rep. 37 and note; *Duff v. Russell*, 60 N. Y. Supr. Ct. 80, affirmed 133 N. Y. 678; *Western Union Telegraph Co. v. Union Pacific R. R. Co.* 1 McCrary, 558.

But in no case will a defendant be restrained, whether or not his contract contains a negative covenant, unless either his services are of a peculiar nature (such as those of an actor or singer), or the damages for their non-performance would be difficult to assess: *William Rogers Company v. Rogers*, 58 Conn. 356; *Sternberg v. O'Brien*, 48 N. J. Eq. 370. In every case, also, it is essential to the interference of the court that the defendant's contract with the plaintiff should be clear and definite. It was held in a recent case that the words "right to reserve" in a contract with a baseball player were not sufficiently definite: *Metropolitan Exhibition Co. v. Ewing*, 42 Fed. Rep. 198.

Equity will also enjoin the disclosure of secrets or of private papers coming into the possession of a confidential employee: *Peabody v. Norfolk*, 98 Mass. 452; *Salomon v. Hertz*, 40 N. J. Eq. 400; *Williams v. Prince of Wales, &c. Co.* 23 Beav. 338; *Merryweather v. Moore* [1892], 2 Ch. 518.]

¹ [Except, perhaps, under very special circumstances, such as inconvenience to the public: *Ballard v. Pittsburgh*, 12 Fed. Rep. 738;

It is upon motions for a preliminary¹ injunction — *i. e.* for an injunction to be granted at once and before the case is tried upon its merits — that the great struggle most often arises in patent cases. When an inventor has secured a patent for a valuable invention, he soon finds, as a rule, that some one is using his invention without license. His first desire is to protect his property by obtaining an injunction against the infringer, but this does not follow as a matter of course.

809. The rules established upon the subject, so far as they may be gathered from the decisions and practice of the courts of the United States, are to the following effect: —

(1) No preliminary injunction will be granted when the patent is new, or has been issued only a few years, and nothing more appears.²

(2) If a patent, new or old, has been established on final hearing, such a decree will sustain a motion for a preliminary injunction, in the same or in any other Circuit Court of the United States, unless the validity of the patent is impeached by some entirely new defence or evidence not presented or presentable at the former hearing.³

(3) If the patent has been sustained by any court upon motion for preliminary injunction after full hearing, other

Hoe v. Boston Daily Advertiser, 14 Fed. Rep. 914; *Southwestern Brush Electric Co. v. Louisiana Electric Light Co.* 45 Fed. Rep. 893. But see *Sickels v. Tileston*, 4 Blatchf. 109.]

¹ [In general, no appeal lies from a decree for a preliminary injunction, but the Act creating the United States Circuit Court of Appeals, as amended by the Act of Feb. 18, 1895, gives an appeal to that court when a preliminary injunction is granted or refused by a circuit or district judge in a case where an appeal from a final decree would lie.]

² [*Barr Co. v. New York, &c. Automatic Sprinkler Co.* 32 Fed. Rep. 79.]

³ [*Brush Electric Co. v. Accumulator Co.* 50 Fed. Rep. 833; *American Bell Telephone Co. v. National Improved Telephone Co.* 27 Fed. Rep. 663; *Cary v. Domestic Spring Bed Co.* 27 Fed. Rep. 299; *Cary v. Lovell Manuf. Co.* 24 Fed. Rep. 141; *American Bell Telephone Co. v. Southern Telephone Co.* 34 Fed. Rep. 795; *Edison Electric Light Co. v. Electric Manuf. Co.* 57 Fed. Rep. 616. As to how strong the new evidence must be, see especially *Edison Electric Light Co. v. Columbia Incandescent Lamp Co.* 56 Fed. Rep. 496; *Electric Manuf. Co. v. Edison Electric Light Co.* 61 Fed. Rep. 834.]

courts are disposed to follow this decision, unless some new evidence or defence is introduced. But this depends very much upon the particular judge.¹

(4) Although the patent has never been in litigation, yet, if the invention has gone into public and common use for several years under license from the patentee, and the trade concerned have acquiesced in the claims of the inventor, such public acquiescence will be sufficient to sustain the motion for a preliminary injunction.²

(5) If the invention relates to some entirely new discovery (or application) in any art or science, — some new subject-matter which has not been touched by any previous patent, — and if, by the common consent and opinion of those most learned in the art or science to which the invention relates, it was never known until revealed by the patentee, the court will grant an injunction, although the patent is of recent date.³

(6) If there has been an Interference in the Patent Office, and a full hearing thereon as to which of two claimants was the original inventor, in a subsequent suit by the patentee (the successful claimant) against the other this adjudication will be considered *prima facie* sufficient to sustain a preliminary injunction.⁴

(7) The foregoing propositions all presuppose that the plaintiff's evidence clearly proves an infringement by the defendant, *i. e.* that the defendant has made, used, or sold, or has threatened and intends to make, use, or sell, the plaintiff's invention, or some substantial part thereof. However

¹ [Cornell v. Littlejohn, 2 Bann. & Ard. (Patent Cases), 324.]

² [Sessions v. Gould, 49 Fed. Rep. 855; Foster v. Moore, 1 Curtis C. C. R. 279; Blount v. Société Anonyme, &c. 53 Fed. Rep. 98; National Typographic Co. v. New York Typograph Co. 46 Fed. Rep. 114. Mere lapse of time is not enough: Guidet v. Palmer, 10 Blatchf. 217. In the following cases the proof of public acquiescence in the patent was held to be insuffi-

cient: Dietz Co. v. Ham Manuf. Co. 47 Fed. Rep. 320; Stahl v. Williams, 52 Fed. Rep. 648.]

³ This was exemplified in the case of the telephone.

⁴ [Dickerson v. De la Vergne Refrigerating Co. 35 Fed. Rep. 143. This, of course, does not apply to a defendant who had no connection with the Patent Office proceedings: Edw. Barr Co. v. N. Y. & N. H. Automatic Sprinkler Co. 32 Fed. Rep. 79.]

clear or well settled the validity of the plaintiff's patent may be, no preliminary injunction will be granted unless it also appears that the defendant has infringed, or has declared his intention to infringe. Absolute certainty is not required upon this point, but before the court will enjoin a defendant from doing a particular act, it must be reasonably satisfied that such act infringes the plaintiff's right.¹

Injunctions in Trade-Mark Suits.

810. The right of property in a trade-mark adopted by any one as his own is well settled and fully recognized both at law and in equity.²

"Trade-mark" means some arbitrary name or symbol affixed by a manufacturer to his goods by which they are known or sold as his goods. It may be a name, as "Eureka Shirts," "Welcome Soap;" or a number³ or some device, as an eagle or a star.⁴ The picture of a dome, for example, accompanied by a name, may be a good trade-mark.⁵

811. The purpose and effect of the trade-mark (in order to be legal) must be to identify the goods as the goods of some particular manufacturer and to designate their origin,

¹ [Steam Gauge & Lantern Co. v. Miller, 8 Fed. Rep. 314, 320; Standard Elevator Co. v. Crane Elevator Co. 56 Fed. Rep. 718. Sometimes the court withholds the injunction upon condition that the defendant shall file a bond to cover any damages that may ultimately be recovered against him: Hoe v. Knap, 27 Fed. Rep. 204; Pullman v. Baltimore & Ohio R. R. 5 Fed. Rep. 72. Especially is this done when the defendant is a mere user, not the maker, or seller of the thing patented: Williams v. McNeely, 56 Fed. Rep. 265. Less frequently an injunction is granted on condition that the plaintiff files a bond to indemnify the defendant, in case the bill is finally dismissed, for the damage occasioned by the injunction: Consolidated Electric Storage

Co. v. Accumulator Co. 55 Fed. Rep. 485. Upon the discovery of new and material evidence, the defendant may apply to the court to have an injunction against him dissolved: Edison Electric Light Co. v. Buckeye Electric Co. 59 Fed. Rep. 691. Judges of the United States Circuit and District courts are empowered by statute to grant restraining orders to keep things *in statu quo* until the motion for a preliminary injunction can be heard and decided. Rev. Stats. § 718.]

² [McLean v. Fleming, 96 U. S. 245.]

³ [American Solid Leather Button Co. v. Anthony, 15 R. I. 338; Glen & Hall Mfg. Co. v. Hall, 61 N. Y. 226.]

⁴ Connell v. Reed, 128 Mass. 477.

⁵ James v. Soulby, L. R. 33 Ch. D. 392.

in distinction from being merely descriptive of their character or quality.¹ This is its whole significance. It is a proclamation that the goods to which it is affixed were made by the owner of that trade-mark.

If the goods of a manufacturer sold under such a trade-mark become popular, — are known to have certain qualifications, and are therefore sought for and purchased under that particular name in the market, — the manufacturer of the goods has a direct right of property in that trade-mark, because it helps to sell his goods; and whoever attaches that same sign to goods of his own manufacture steals the name of the first manufacturer, and also commits a fraud upon the public. He virtually represents to the public that he is selling the goods of A's manufacture, whereas in fact he is selling his own goods with A's trade-mark falsely affixed to them.

812. This doctrine has recently been made to include not only the manufacturer of an article, but also one whose established business is the selection and sale of an article of a certain standard and quality. In *Menendez v. Holt*² the plaintiff was not a manufacturer of flour, but his business for years had been to select the best known brands of flour, and to sell them under the name of "La Favorite." This trade-mark designated that the flour thus marked had been selected by the plaintiff as being of a certain standard and quality, and it had acquired a large commercial value. "The trade-mark," said the court, "did not indicate by whom the flour was manufactured, but it did indicate the origin of its selection and classification."

813. In order to obtain an injunction for the infringement of a trade-mark it is necessary for the plaintiff to show: —

(1) His title to the trade-mark; *i. e.* that he has adopted and used it in his business, and that his goods have become known to the trade, and have been sold by that particular trade-mark. "There must have been such a sale [or use] as

¹ [Brown Chemical Co. v. Meyer, U. S. 537; Manufacturing Co. v. 139 U. S. 540; Lawrence Manuf. Trainer, 101 U. S. 51.]
Co. v. Tennessee Manuf. Co. 138 ² 128 U. S. 514, 520.

will establish in the mind of the public a connection between the name and the plaintiff's [article] newspaper." ¹

(2) The trade-mark must be a proper one. The true purpose of a trade-mark, as I have said, is to identify the goods as the manufacture of some particular person. It is a proclamation to the public that the goods carrying that signal were made by some particular person and by no one else. It is therefore necessary, in adopting a trade-mark, to select a name or symbol which, after such adoption, no one else will have an equal right to use.

814. In accordance with these principles, it is settled that no one can acquire an exclusive right to a merely geographical name as a trade-mark. Thus, where coal had been sold as "Lackawanna Coal," it was held that, this name being merely the name of the valley in Pennsylvania where that kind of coal was found, any one else mining coal in the valley had a right to advertise it as Lackawanna Coal.²

815. To the rule, that no exclusive right as a trade-mark can be acquired in a merely geographical name, there is one seeming exception, or rather there is one case in which the court will protect a trade-mark consisting of a geographical name. When a manufacturer has truly applied the name of his town or district to his goods, and they have become known by that name, he will be protected as against one whose goods are manufactured elsewhere, and who falsely and fraudulently affixes to them the same name, in order that they may pass as goods made by the original manufacturer.

The cases upon this point are reviewed, and the true distinction is stated, in *Canal Co. v. Clark*.³ One or two illustrations will suffice. In *Newman v. Alvord*⁴ the plaintiff for thirteen years had manufactured at Akron from beds in that town, a cement or water-lime, and had sold it as Akron Cement. The defendants, taking up the business twelve years later, manufactured cement in a distant place and sold it as "Onondago Akron Cement," evidently with the purpose

¹ *Licensed Victuallers' Newspaper Co. v. Bingham*, L. R. 38 Ch. D. 139.

² *Delaware & Hudson Co. v. Clark*, 13 Wall. 311.

³ 13 Wall. 311.

⁴ 51 N. Y. 189.

of confounding it with the true Akron Cement, and they were enjoined. Mr. Justice Strong, in *Canal Co. v. Clark*, comments on this case as follows: "The act of the defendants was therefore an attempted fraud, and they were restrained from applying the word 'Akron' to their manufacture. But the case does not rule that any other manufacturer at Akron might not have called his product Akron Cement, or Akron Water-lime. On the contrary, it substantially concedes that the plaintiffs, by their prior appropriation of the name of the town in connection with the words 'cement' and 'lime,' acquired no exclusive right to its use as against any one who could use it with truth."¹

¹ In *Anheuser-Busch Brewing Association v. Piza*, 24 Fed. Rep. 149, the defendants, who made beer in New York, were restrained from labelling it "St. Louis Beer," which was the trade-mark of the plaintiff, a brewer at St. Louis. See, also, *Pike Manuf. Co. v. Cleveland Stone Co.* 35 Fed. Rep. 896. [In *Wotherspoon v. Currie*, L. R. 5 H. L. 508, the defendant was restrained from using the trade-mark "Glenfield Starch," which had long been used by the plaintiff. Glenfield was originally the name of an estate, upon which about sixty persons only were living when this suit was brought. It was not a town or a parish. The defendant's factory was situated at Glenfield, but the plaintiff's factory had been moved from there to Paisley. Fraud and imitation of the plaintiff's labels were clearly proved. A stronger case is the more recent one of *Thompson v. Montgomery*, L. R. 41 Ch. D. 35; [1891] App. Cas. 217. The plaintiffs and their predecessors had maintained a brewery in Stone, a town of six thousand inhabitants, for a century, and their ale had become widely known as "Stone

Ale." They were the only brewers at Stone, until the defendant built a brewery there, and began selling his ale as "Stone Ale," imitating also the plaintiffs' labels. He was enjoined from using the words "Stone Ale," the ground of the decision being thus stated by Lord Justice Lindley: "The plaintiffs' rights are to prevent anybody from passing off his goods as the goods of the plaintiffs. Sir Horace Davey [defendant's counsel] says that the plaintiffs have no exclusive right to the use of the words 'Stone Ale' alone. Perhaps not, as against the world. He says that the plaintiffs have not any right to prevent the defendant selling his goods as having been made at Stone. I am not prepared to say that they have. But as against a particular defendant who is fraudulently using, or going to fraudulently use, the words with the express purpose of passing off his goods as the goods of the plaintiffs, it appears to me that the plaintiffs may have rights which they may not have against other traders." The court in this case based their decision mainly upon the *Glenfield Starch* case, just

816. A kindred rule is the following: No name which is merely descriptive of the qualities of an article can be appropriated as a trade-mark. Such qualities belong to the article equally whether made by this person or by that; and consequently a title or name merely descriptive of them, and not pointing to the particular manufacturer, cannot be appropriated by any one maker more than by another.¹

stated, although, as Lord Justice Cotton admitted, "this case goes very much further than that." In *New York & R. Cement Co. v. Coplay Cement Co.* 44 Fed. Rep. 277, s. c. 45 Fed. Rep. 212, the court refused to enjoin the defendants from using as a trade-mark the words "Rosendale Cement," although the defendant's cement was not made in Rosendale, nor from rock quarried there. No imitation of labels was alleged. But this decision was put upon the ground that the plaintiff was only one of fifteen or twenty manufacturers in Rosendale who had a right to describe their goods as "Rosendale Cement." The court said: "In our view, if a person seeks to restrain others from using a particular trade-mark, trade-name, or style of goods, he must show that he has an exclusive ownership or property therein. To show that he has a mere right, in common with others, to use it, is insufficient." This proposition (though not the decision of the case) is obviously at variance with the rule laid down in *Thompson v. Montgomery*. See *Carlsbad v. Tibbetts*, 51 Fed. Rep. 852. When one, by imitation of labels or otherwise, attempts to sell his goods as being the goods of another, he will be restrained, even though the other's trade-mark is invalid, provided, of course, that it is not dishonest. See

Cleveland Stone Co. v. Wallace, 52 Fed. Rep. 431, and the cases there cited; and *Putnam Nail Co. v. Bennett*, 43 Fed. Rep. 800; *Improved Fig Syrup Co. v. California Fig Syrup Co.* 54 Fed. Rep. 175; *Southern White Lead Co. v. Cary*, 25 Fed. Rep. 125; *Société Anonyme, &c. v. Western Distilling Co.* 43 Fed. Rep. 416; *American Brewing Co. v. St. Louis Brewing Co.* 47 Mo. App. 14.]

¹ *Manufacturing Co. v. Trainer*, 101 U. S. 51; *Raggett v. Findlater*, L. R. 17 Eq. 29. [Thus the name of a patented article or machine becomes a descriptive name after the expiration of the patent, and cannot be monopolized by the patentee as a trade-mark: *Ralph v. Taylor*, L. R. 25 Ch. D. 194, 199; *In re Palmer's Trade-mark*, L. R. 24 Ch. D. 504, 517, 521; *Coats v. Merrick Thread Co.* 36 Fed. Rep. 324; *Singer Manuf. Co. v. June Manuf. Co.* 41 Fed. Rep. 208. Where a new material has been invented, and the name given to it is used as a trade-mark, the owner of the trade-mark is entitled to protection, although the name has acquired a descriptive meaning: *Celluloid Manuf. Co. v. Cellonite Manuf. Co.* 32 Fed. Rep. 94. But the owner cannot prevent the application of the name to some material or article of a different nature: *Celluloid Manuf. Co. v. Read*, 47 Fed. Rep. 712.]

Thus a manufacturer of white lead, or "water cement," cannot acquire an exclusive right to either of those names by stamping it on each package which he makes, because the name is merely descriptive of the article itself, and does not designate its particular maker.

Every manufacturer of white lead, or water cement, has a right to stamp the article with its appropriate name, and also to call it "first-class" white lead, because that term also is merely descriptive of the grade or quality of the article. But if a manufacturer of white lead has been in the habit of stamping his goods as the "Eagle White Lead," and goods with that stamp have become known as his manufacture, then "Eagle White Lead" in fact means white lead manufactured by A B in distinction from that made by the rest of the alphabet. From the superiority of his goods this brand may have acquired a great reputation, and whoever attempts to steal his distinctive mark and to apply it to his own goods commits a wrong which equity will promptly enjoin.¹

So "Goodyear Rubber" or "Goodyear India Rubber," having become popularly known, and being used as a term descriptive of goods manufactured according to Goodyear's invention, no one could appropriate that term as a trade-mark for such goods.²

In another case, "Acid Phosphate," being a purely descriptive phrase, was held not to be a good trade-mark.³

817. Another essential of a valid trade-mark is this: it must contain no false statement as to the character of the

¹ Canal Co. v. Clark, 13 Wall. 811, *supra*.

² Goodyear's India Rubber Glove Co. v. Goodyear Rubber Co. 128 U. S. 598.

³ Rumford Chemical Works v. Muth, 35 Fed. Rep. 524. [See, also, Brown Chemical Co. v. Meyer, 139 U. S. 540 ("Iron Bitters");

Harris Drug Co. v. Stucky, 46 Fed. Rep. 624 ("Cramp Cure"); Alff v. Radam, 77 Tex. 530 ("Microbe Killer"); *In re* Meyerstein's Trade-mark, L. R. 43 Ch. D. 604 ("Sat-inine"). But in *Waterman v. Shipman*, 130 N. Y. 301, "Ideal Pen" was held to be a good trade-mark.]

article itself, nor as to the person by whom or the place where it was made.¹

818. An important question arises here as to how far a manufacturer who uses his own name as a trade-mark, or as a prominent part of it, will be protected against the use of the same or a similar name by a subsequent manufacturer. He will of course be protected against the use of his name by persons not bearing the same name. In such a case, the assumption of his name is without any pretence of right.² But a more serious question arises when the subsequent manufacturer has in reality the same name as the prior manufacturer. Can a man be restrained from using his own name as a trade-mark, even though such use may induce the public to believe that they are purchasing the goods of another manufacturer? There are some inherent difficulties in the case, as will readily be seen. A manufacturer, for example, by the name of Chickering, has made and sold pianos under the name of "Chickering Pianos," and they have acquired great celebrity. If another manufacturer by the same name springs up and sells his product also as "Chickering Pi-

¹ The cases are reviewed in *Manhattan Medicine Co. v. Wood*, 108 U. S. 218. See, also, *Petridge v. Wells*, 4 Abbott (N. Y.) Rep. 144; *Connell v. Reed*, 128 Mass. 477; [*Joseph v. Macowsky*, 96 Cal. 518; *Krauss v. Peebles*, 58 Fed. Rep. 585; *Pidding v. How*, 8 Sim. 477; *Perry v. Truefitt*, 6 Beav. 66. For the limit of this rule, see *Pratt's Appeal*, 117 Pa. St. 401. In *Koehler v. Sanders*, 122 N. Y. 65, the court refused to protect the use of the name "International Banking Co." to designate persons who, in fact, were not bankers. It has been held that a name importing a corporation, in this case "Ætna Iron Works," cannot be appropriated by a partnership: *Clark v. Ætna Iron Works*, 44 Ill. App. 510. It is not necessary that the deception

should inhere in the trade-mark itself. If misleading words or symbols are used in connection with it, the trade-mark will not be protected. This principle was applied in the case of a "fruit" pudding which, as a chemical analysis disclosed, contained no fruit: *Clotworthy v. Schepp*, 42 Fed. Rep. 62. The fact that the article sold is as good as the article which it is falsely represented to be, is immaterial: *Prince Manuf. Co. v. Prince's Metallic Paint Co.* 135 N. Y. 24. Some courts refuse to interfere when the article concerned is a quack medicine. See *Kohler Manuf. Co. v. Beeshore*, 59 Fed. Rep. 572, and the cases there cited.]

² *Gilman v. Hunnewell*, 122 Mass. 139, 148.

anos," he has only truly used his own name, and yet practically he may have stolen the flag of the other maker. The result of all the cases upon this subject seems to be as follows: A man cannot acquire an exclusive right to the use of his mere name as against another person of the same name; but if this second person resorts to any further imitation or to any artifice whatever calculated to represent his goods as being those of the other, he will be enjoined.¹

819. This principle, moreover, has been extended to artificial or adopted names, as in *Lee v. Haley*.² In that case the plaintiffs had long been established in Pall Mall as the "Guinea Coal Company," and they were popularly known as "The Pall Mall Guinea Coal Co." Other Guinea coal companies existed in other parts of London. The defendants planted themselves in Pall Mall, very near to the plaintiffs, with the name of "The Pall Mall Guinea Coal Co.," under circumstances indicating that they intended to lead the public to believe that they were the original Guinea Coal Company. Lord Justice Gifford said: "I quite agree that they [the plaintiffs] have no property in the name, but the principle upon which the cases on this subject proceed is, not that there is a property in the word, but that it is a fraud upon a person who has established a trade and carries it on under a given name that some other person should assume the same name, or the same name with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name."³

820. The defendant will not be restrained unless he has used a substantial imitation of the plaintiff's trade-mark.⁴

¹ *Turton v. Turton*, L. R. 42 Ch. D. 128; *McLean v. Fleming*, 96 U. S. 245; *Gilman v. Hunnewell*, *supra*.

² L. R. 5 Ch. App. 155, 161.

³ In the following cases, also, the defendant was restrained: *Holloway v. Holloway*, 13 Beav. 209; *Seixo v. Provezende*, L. R. 1 Ch. App. 192; *Metzler v. Wood*, L. R.

8 Ch. D. 606. In these cases the court refused to enjoin: *Burgess v. Burgess*, 3 De G., M. & G. 896; *Rogers v. Taintor*, 97 Mass. 291; *Gilman v. Hunnewell*, 122 Mass. 139. [The name of a hotel will be protected: *Howard v. Henriques*, 3 Sandf. 725; *Woodward v. Lazar*, 21 Cal. 448.]

⁴ [It is immaterial whether or not

It is not necessary that it should be an exact imitation, or one that would mislead an expert.¹ The ordinary customer is not supposed to be on the lookout for counterfeits, and therefore if the imitation, however imperfect, is such as would naturally mislead or deceive him, it is sufficient. Under such circumstances equity is much more solicitous to protect the true owner of a trade-mark than to shield a dishonest imitator.²

Proof that actual purchasers have been misled by the imitation is always admissible, and is quite decisive in itself.³

821. A word used as a trade-mark is addressed to the eye as well as to the ear, and hence if the pictorial part of the trade-mark is imitated, the inference of infringement will be stronger.⁴

the defendant's motive was fraudulent : *Pratt's Appeal*, 117 Pa. St. 401. Cases of infringement are : *Hutchinson v. Covert*, 51 Fed. Rep. 832 ; *New Home Sewing-Machine Co. v. Bloomingdale*, 59 Fed. Rep. 284.]

¹ [In *Von Mumm v. Frash*, 36 Fed. Rep. 830, 839, the court say : "It is no answer to say that the ultimate purchaser was ignorant or unwary. . . . The defendants dress up their article in the way they do with the distinct purpose of enabling the weak, the ignorant, and the careless to be defrauded thereby ; and when their purpose is accomplished, I discern no just ground upon which to except [sic] them from responsibility." But see *Heinz v. Lutz*, 146 Pa. St. 592, 599.]

² *McLean v. Fleming*, 96 U. S. 245, *supra*.

³ *Lawrence Manufacturing Co. v. Lowell Hosiery Mills*, 129 Mass. 325, 328 ; *Metzler v. Wood*, L. R. 8 Ch. D. 606, *supra*. [A trade-mark may be infringed without imi-

tating it. In *Enoch Morgan's Sons' Co. v. Wendover*, 43 Fed. Rep. 420, the plaintiff, who made a soap known as "Sapolio," proved that on several occasions customers who asked for "Sapolio" at the defendant's shop were handed the soap of a different maker, which was marked "Pride of the Kitchen." The court held that this was a violation of the plaintiff's trade-mark, although there was no resemblance between the two packages. In *Hos-tetter Co. v. Brueggeman-Reinert Co.* 46 Fed. Rep. 188, the defendant was restrained from advising its customers to infringe the plaintiff's trade-mark.]

⁴ *Glen Cove Manufacturing Co. v. Ludeman*, 23 Blatchf. 46 ; *Estes v. Leslie*, 29 Fed. Rep. 91 ; *Evans v. Von Laer*, 32 Fed. Rep. 153. [The imitation of a package peculiar in form and color may be enjoined : *Fischer v. Blank*, 138 N. Y. 244 ; *Sperry v. Percival Milling Co.* 81 Cal. 252. But see *Brown v. Seidel*, 153 Pa. St. 60 ; *Hoyt v. Hoyt*, 143 Pa. St. 623.]

822. NATURE OF THE RIGHT. — The right to a trade-mark is in this country strictly a common-law right, *i. e.* it exists independently of any statute.¹ Congress attempted

¹ [There is much conflict of opinion as to the ground and nature of property in trade-marks. It is asserted in some decisions (as in *Chadwick v. Covell*, 151 Mass. 190) that the basis of equitable interference in these cases is imposition upon the public; but the better and more common opinion is that equity interferes to protect a private right of property, for there can be no private suit for a public wrong. See *Schneider v. Williams*, 44 N. J. Eq. 391, where the authorities are cited. It is disputed also whether a trade-mark may be acquired instantly, by mere selection, or whether it must be used long enough to become identified with the article to which it is affixed. In *Browne on Trade-marks*, § 52, it is stated that a trade-mark may be acquired instantly. For the contrary and better opinion, see § 813, *supra*, and *Levy v. Waitt*, 61 Fed. Rep. 1008. A trade-mark may be devised or transferred to one, or even to several, who continue its original use. *Pratt's Appeal*, 117 Pa. St. 401. But, according to the weight of authority, it cannot be sold "as distinct property separate from the article created by the original producer." If it could thus be sold, it might be used to designate articles entirely different in origin or character from those to which it was originally given, and thus the public would be deceived. See *Kidd v. Johnson*, 100 U. S. 617; *Brown Chemical Co. v. Meyer*, 139 U. S. 540; *Hall v. Barrows*, 4 De G., J. & S. 150; *Derringer v.*

Plate, 29 Cal. 292. But in *Bradbury v. Dickens*, 27 Beav. 53, upon a dissolution of the partnership for the publication of "Household Words," conducted by Charles Dickens, the bare title of the magazine was, by order of the court, put up at auction and sold for the benefit of the partnership. It brought the sum of £3,550.

A question of much interest and importance has arisen lately respecting the validity of trade-mark labels used by trade unions. The Cigar-makers' International Union adopted a label to be affixed to all cigars made by its members, as a warranty that they were so made, and were not the product of inferior or "tenement house" workmanship. It acquired a high value in the market. The members of the Union are not themselves manufacturers or dealers in cigars; they only make them. In *People v. Fisher*, 50 Hun, 552, it was held that the label constituted a valid trade-mark, but this decision of the Supreme Court of New York is contrary to the following cases: *Schneider v. Williams*, 44 N. J. Eq. 391; *Cigar-makers' Protective Union v. Conhaim*, 40 Minn. 243; *Weener v. Brayton*, 152 Mass. 101. See, also, *Strasser v. Moonelis*, 108 N. Y. 611. Various objections were made in these decisions to the trade-mark in question: (1) That the owners of it were a large and continually varying body; (2) that the damages which they might incur would be remote and speculative; and finally, the leading case upon the

to grant and to regulate it by statute (21 Stats. at Large, 502) ; but the United States Supreme Court held that the Constitution conferred no power upon Congress to legislate in regard to trade-marks, except so far as goods intended for export, or for trade with the Indian tribes, or for interstate commerce,¹ are concerned, and consequently that such legislation was unconstitutional.²

823. In many States, in Massachusetts³ for example, statutes exist regulating more or less the remedy in cases of trade-marks.

Copyright.

824. The term "copyright" signifies the exclusive right which an author has to print and publish or sell his produc-

subject. *Schneider v. Williams*, was decided almost entirely upon the point (3) that the members of the Union acquired no title to the trade-mark, because they did not themselves put upon the market the article to which it was applied.

But these objections might be answered by saying — taking them in the reverse order — (1) that the cigars were made with the design and expectation of their being put upon the market, that this result followed, and the trade-mark thus acquired a high value ; (2) that the demand for cigars made by the Union must necessarily be reduced to the extent of the infringing cigars sold, so that the Union would suffer a corresponding loss in work and wages ; and (3) that, although the Union consisted of a large and varying body of members, this might be true also, and is true, to a less extent, of partnerships, and it was never doubted that a partnership might hold a valid trade-mark. In all of the decisions just examined the method of reasoning was to state the definitions of a trade-mark laid down by the authorities, and then

to ask whether those definitions included the novel and unforeseen kind of trade-mark now in question. It may not be embraced by the language of the definitions, but that it comes within the principle which they state would seem to be a reasonable conclusion, were not the weight of authority so decidedly against it. In *Carson v. Ury*, 39 Fed. Rep. 777, the bill was brought, not by the Union, but by a dealer in Union-made cigars, and an injunction was granted against another dealer who had counterfeited the Union label. The court said : "This is not a trade-mark case ; . . . it is a bill filed to restrain the defendant from perpetrating a fraud which injures the complainant's business," citing *McLean v. Fleming*, 96 U. S. 245, *supra*.]

¹ This limited power is of course derived from that useful clause in the Constitution which confers upon Congress "power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

² Trade-mark Cases, 100 U. S. 82.

³ Pub. Stats. ch. 76.

tions. It was formerly a question whether at common law an author had this exclusive right, or any right which the common law would protect; but it is now well settled (at least for this country) that an author has no such right unless it is expressly created and conferred by statute.¹

By the Constitution of the United States the power to pass laws granting patents or copyrights is conferred exclusively upon Congress, and therefore no State can legislate upon either of these subjects. Consequently the only right which an author can assert in this country to a copyright is under and by virtue of some act of Congress, and we must therefore refer to those acts to ascertain what that right is.² By modern legislation the scope of copyright has been very much extended, and it now includes not only the author of any book, map, chart, or dramatic or musical composition, but also the inventor or designer of any engraving, cut, print, or photograph, or of any painting, drawing, statue, atlas, or chromo. Copyrights are originally granted for twenty-eight years, and they may be renewed for a further term of fourteen years. In order to secure a copyright the author must comply with certain simple directions, as to filing a copy of his work, etc., which are plainly set forth in the statute.

825. If the author of any work covered by the statute voluntarily publishes it before securing a copyright, that constitutes a dedication to the public, and he cannot thereafter obtain a copyright, or if he does, it is invalid.³

826. WHAT CONSTITUTES AN AUTHOR? Or what degree of originality is necessary in a work to entitle it to a copyright? To constitute a person an author, he must, by his own intellectual labor applied to the materials of his work, produce an arrangement or compilation substantially new in itself. His ideas may not be new, his facts may not be new; yet, if the plan, arrangement, and combination of the materials are new, — if they are for the first time brought

¹ *Wheaton v. Peters*, 8 Pet. 591.

³ *Bartlett v. Crittenden*, 5 Mc-

² The provisions upon the subject are contained in United States Revised Statutes, title 60, ch. 3.

Lean, 32; *Fulte v. Derby*, 5 McLean, 328.

together in this new form, — the work is within the protection of the statute.¹

“Copyright may justly be claimed by an author of a book who has taken existing materials from sources common to all writers, and arranged and combined them in a new form, and given them an application unknown before, for the reason that in so doing he has exercised skill and discretion in making the selections, arrangement, and combination; and, having presented something that is new and useful, he is entitled to the exclusive enjoyment of his improvement, as provided in the copyright act.”²

827. The mechanical arrangement on the stage of flowing water and a tank (in which the villain fell from a bridge) was held to be not a “dramatic composition” under the statute.³

828. A reporter of the decisions of a court is so far an author as to be entitled to copyright covering his own work, namely, the statement of the case, the head-notes, the summary of the arguments by counsel, the table of cases, etc.⁴ But when all this is done by the judges themselves, there can be no copyright in the work. A judge who in his judicial capacity (*i. e.* in the performance of his duty as judge) prepares the head-notes, etc., cannot be regarded as an “author or proprietor” in the sense of the statute. “The fruits of his judicial labors” belong to the public.⁵

¹ Gray *v.* Russell, 1 Story’s Rep. 11.

² Lawrence *v.* Dana, 4 Clifford, 1, 75.

³ Serrana *v.* Jefferson, 33 Fed. Rep. 347. The court distinguish this case from that of *Daly v. Palmer*, 6 Blatchf. 264, where a railroad scene, involving the use of a real track and locomotive, was held to be a “dramatic composition.” [*Daly v. Palmer* was followed in the recent case of *Daly v. Webster*, 56 Fed. Rep. 483. In *Fuller v. Bemis*, 50 Fed. Rep. 926, where a dance, accompanied by lights, draperies, &c., was held not to be a dramatic composition, Judge La-

combe intimates that some of the dicta in *Daly v. Palmer* go too far, and he gives this definition: “It is essential to such a [dramatic] composition that it should tell some story. The plot may be simple. It may be but the narrative or representation of a single transaction; but it must repeat or mimic some action, speech, emotion, passion, or character, real or imaginary.” As to the copyright of a “topical” song, see *Henderson v. Tompkins*, 60 Fed. Rep. 758.]

⁴ *Callaghan v. Myers*, 128 U. S. 617.

⁵ *Banks v. Manchester*, 128 U. S. 244, 253.

829. AS TO PHOTOGRAPHS. — An interesting question has arisen how far, if at all, any one can be said to be the inventor or designer of a photograph.

Sarony, a photographer in New York, obtained copyright for a photograph which he made of Oscar Wilde, and this photograph was imitated and reproduced by the defendant, against whom Sarony proceeded for infringement. The defendant contended that a photograph was the mere mechanical reproduction of the physical features or outlines of the object photographed, and that it involved no originality of thought, and no novelty in the intellectual operation connected with its visible reproduction in the shape of a picture. The judge before whom the case was tried at the circuit found as a fact "that the photograph was a useful, new, harmonious, characteristic, and graceful picture, and that the plaintiff made the same entirely from his own original mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by plaintiff, he produced the picture in suit."

The Supreme Court said: "These findings, we think, show this photograph to be an original work of art, the product of plaintiff's intellectual invention, of which plaintiff is the author," and so within the protection of the act.¹

830. INFRINGEMENT. — When infringement occurs, a court of equity will enjoin the printing or publication or sale of the offending work; and it is a case which particularly calls for this kind of equitable relief, for it would always be very difficult to determine at law how much the author had been injured by the pirating work.

What amounts to infringement? I cannot answer this question better than by quoting the words of Judge Story:²

¹ Burrow-Giles Lithographic Co. in *Nottage v. Jackson*, L. R. 11 Q. n. Sarony, 111 U. S. 53, 60. A similar decision was made in England

B. D. 627.
² *Folsom v. Marsh*, 2 Story's Rep. 100, 115.

"It is certainly not necessary, to constitute an invasion of copyright, that the whole of a work should be copied, or even a large portion of it, in form or in substance. If so much is taken that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient in point of law to constitute a piracy *pro tanto*. . . . Neither does it necessarily depend upon the quantity taken whether it is an infringement of the copyright or not. It is often affected by other considerations,—the value of the materials taken, and the importance of it to the sale of the original work."¹

831. *Bonâ fide* quotations do not constitute infringement, whether they are introduced in another work, or are made by a reviewer for the purpose of showing the merit or demerit of the book. But this privilege of extracts or quotations cannot be exercised so as to supersede the original work.

Nor is it piracy to use the facts or materials furnished by an author, if the application, arrangement, or combination of these facts or materials in the second work is substantially new.

It was said by the United States Supreme Court, "The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book."² And the same is equally true of all works which deal either with facts or with ideas.

832. Any one may orally repeat a book or play which has been published by the author, or any part of it, but he cannot reproduce and republish it, or a substantial part of it, in writing or in print. For example, one may dramatize any published book, using as much of the original language and plot as he pleases, and he may exhibit the production

¹ See, also, *Lawrence v. Dana*, 4 Cliff. 1, 74.

² *Baker v. Selden*, 101 U. S. 99, 103.

on the stage, but he cannot, either by written or printed copies, publish the drama thus made up.¹

833. UNPUBLISHED MANUSCRIPTS. — Equity will enjoin, in behalf of the owner or author, the unlicensed publication or use of manuscripts. Questions upon this subject commonly relate to literary compositions, including musical and dramatic compositions, or to private letters. If one undertakes to publish or to perform a dramatic composition which the author has not made public in any way, he will, according to all the authorities, be enjoined.

But suppose a dramatic author, who has never printed or copyrighted his composition, allows it to be performed: is this a dedication of it to the public? May any one present take a report of it, or write it out afterward from memory, and then publish it or cause it to be performed? There has been some conflict of opinion upon this subject, but the settled doctrine now is, that the author of a composition, dramatic or otherwise, does not dedicate it to the public by allowing it to be performed or repeated in public, and no one thereby acquires the right to reproduce it in any form.

Thus, in *Boucicault v. Hart*,² it was held that where the author of a dramatic composition has not printed it, but has only permitted it to be represented on the stage through his selected channels, he cannot be said to have abandoned it or dedicated it to the public, nor has he published it within the meaning of the United States statute in regard to copyright. The right of an author to retain and use his composition (whatever it may be) is a common-law right, which equity will protect. The cases are well reviewed in *Tompkins v. Halleck*.³ The same rule applies to musical compositions, and to lectures, literary, theological, medical, or legal.

834. PRIVATE LETTERS. — The question has sometimes been mooted, In whom is the ownership of letters, — in the writer or the receiver?

¹ *Warne v. Seehohm*, L. R. 39 Ch. D. 73. In this case the story of "Little Lord Fauntleroy" was dramatized, and four copies of the drama were made, one being given to the Lord Chamberlain, the other three being kept by the defendant and the actors. This was held to be an infringement of the copyrighted story.

² 13 Blatchf. 47.

³ 133 Mass. 32.

If there be any ownership in the receiver, it exists only in a very modified degree. It is equally clear, in reason and law, that neither the receiver¹ nor any one else has a right to publish a private letter without the consent, express or implied, of the writer. A private letter is addressed confidentially to the receiver. It ordinarily carries with it no implied license to publish it, or to submit it to any other eye. Such license of course may very often be inferred from the tenor of the letter itself, or from the relation of the parties, or from the circumstances of the case, and it may be implied when the letter is needed to establish a claim to property, or to vindicate character. But the mere writing and receipt of a private letter never justify of themselves its publication.

With the exception noted, the property in letters, including the exclusive right to publish them, is in the author or writer.²

¹ [In 1741 the Lord Chancellor granted an injunction in favor of Pope, restraining Curl, the bookseller, from publishing letters written by Pope and Swift. The defendants took the point that the book in question was not a "learned" work, and so not within the statute (8 Anne, 19), because it contained "only letters on familiar subjects, and inquiries after the health of friends." But the Chancellor, Hardwicke, remarked: "It is certain that no works have done more service to mankind than those which have appeared in this shape upon familiar subjects, and which, perhaps, were never intended to be published, and it is this makes them so valuable; for I must confess, for my own part, that letters which are very elaborately written, and originally intended for the press, are generally the most insignificant, and very little worth any person's reading." *Pope v. Curl*, 2 Atk.

342. This case was followed by that of *Thompson v. Stanhope* (2 Amb. 737), where the executors of Lord Chesterfield obtained an injunction against Eugenia Stanhope, the widow of his son Phillip, and Dodsley the printer, from publishing those letters of Lord Chesterfield which afterwards became famous. The executors did not apply for an injunction until the book was printed, and almost ready to be put upon the market. The Lord Chancellor intimated that their application should have been made earlier, and he added a recommendation that the executors should permit the publication, "in case they saw no objection to the work upon reading it, and having the copies delivered to them." To the same effect, *Earl of Granard v. Dunkin*, 1 Ball & B. (Ir. Ch.) 207.]

² *Folsom v. Marsh*, 2 Story, 100. [A case of some interest is that of *Eyre v. Higbee*, 35 Barb. 502, where

835. Whenever they are required as evidence in a court of justice, the receiver must produce them. Lord Cairns, in *Hopkinson v. Lord Burghley*,¹ said: "The writer is supposed to intend that the receiver may use it for any lawful purpose, and it has been held that publication is not such a lawful purpose. But if there is a lawful purpose for which a letter can be used, it is the production of it in a court of justice for the furtherance of the ends of justice."

836. There can be no case where a court of equity will be more prompt in its action than when it enjoins the wrongful publication of private letters or other private writings. No mere damages can ever be a compensation for such a breach of confidence, and for the annoyance and distress which it would often produce.²

it was held that the executor of the widow of Colonel Tobias Lear, Washington's military secretary, had no authority to sell or to give away letters written by Washington to Colonel Lear.]

¹ L. R. 2 Ch. App. 447.

² [This doctrine is maintained by Judge Story in *Folsom v. Marsh*, *supra*, and in 2 Story's Eq. §§ 944-948. See, also, *Woolsey v. Judd*, 4 Duer, 379, 389; *Eyre v. Higbee*, 35 Barb. 502. But as yet it appears to be not well established. See High on Injunctions, 3d ed. § 1012; *Wetmore v. Scovell*, 3 Edw. Ch. 515; *Gee v. Pritchard*, 2 Swans. 402, 422.

The elastic but consistent principles of equity have recently been applied to the new purpose of protecting what is called "the right to privacy," or as Judge Cooley terms it, "the right to be let alone." There are intimations of such a right in more than one of the old cases. Thus, in *Prince Albert v. Strange*, 1 McN. & G. 25, 47, where the court restrained the defendant from publishing a mere catalogue of

etchings made by Queen Victoria and Prince Albert, Lord Cottenham remarked: "In the present case, where privacy is the right invaded, postponing the injunction would be equivalent to denying it altogether." But in these cases, as in all other English cases touching this subject, the decision was put upon the ground that some right of property had been invaded, — that there was either a breach of contract or a breach of trust, or both. This was the basis of the decision even in *Pollard v. Photographic Co.* L. R. 40 Ch. D. 345, where the defendant was restrained from selling copies of the plaintiff's photograph which he had been employed by her to take. But supposing that the defendant had been a stranger, and that he had surreptitiously taken her picture? In such a case there could be no breach either of contract or of confidence, so that there would be no ground for enjoining the defendant, unless the plaintiff's right to privacy was admitted.

This right was first formulated

837. SECRET INVENTIONS. — Whenever a person has made an invention which he has not patented, whether it

in an essay published in the *Harvard Law Review*, vol. iv. p. 193, by Messrs. Warren and Brandeis of the Boston Bar. These authors maintained (1) that the individual has a right to privacy, which was always recognized in equity, though in an obscure and rudimentary way; (2) that, under the conditions of modern life, this right cannot receive adequate protection if it is to be enforced only when some right of property, in the strict sense, is invaded; and (3) that the logical, fundamental principle upon which equity interferes to prevent publication of personal writings, or pictures, or information, is "not the principle of private property, but that of an inviolate personality." The "right to privacy," it was admitted, does not extend to public characters, such as actors, authors, and politicians. Such persons, having voluntarily put themselves before the public, have abandoned their right to privacy.

These principles were recognized and applied in *Schuyler v. Curtis*, 40 N. Y. St. Rep. 289. In that case the representatives of the late Mrs. George Schuyler brought suit to restrain the defendants from exhibiting at the Chicago Fair a bust of Mrs. Schuyler, labelled "The Typical Philanthropist," in company with a bust of one Susan B. Anthony, which was to be labelled "The Typical Reformer." The plaintiffs represented that Mrs. Schuyler was not a public character, and that she had always shown a particular aversion to notoriety. The court granted the injunction, remarking: "It is sometimes diffi-

cult to determine in individual cases when one ceases to be a private and becomes a public character. This, however, does not destroy the value of the distinction, nor the grounds upon which it can be supported." This decision was affirmed by the full bench of the Supreme Court, 46 N. Y. St. Rep. 720; and the case is still pending in the Court of Appeals.

In *Marks v. Jaffa*, 6 Misc. 290 (N. Y.), s. c. 26 N. Y. Supp. 908, the defendant, the editor of a newspaper, was enjoined from publishing a picture of the plaintiff, a law student and former actor, and from soliciting votes for him in a "popularity" contest in the paper. In a case (unreported) which arose in New York, it appeared that the defendant had surreptitiously taken a photograph of the plaintiff, an actress, as she appeared in tights upon the stage, and he was enjoined by preliminary injunction from selling copies of it. Afterward the injunction was made permanent, the defendant not appearing.

In *Corliss v. Walker*, 57 Fed. Rep. 434, the court refused to enjoin publication of a biography of the late Mr. Corliss, on the ground that to do so would be an interference with the liberty of speech; and in *Corliss v. Walker*, 64 Fed. Rep. 280, the court held that the defendant had a right to publish and sell photographs of Mr. Corliss, on the ground that he was a public character. In both of these cases the "right to privacy" was admitted, but not, perhaps, as disassociated from some property right.

In *Monson v. Tussaud*, *The Times*

relates to a machine, process, or composition of matter, and he confidentially discloses it to another, equity will enjoin that other from divulging it to the public or using it himself.¹

Injunctions against Personal Torts.

838. LIBEL. — All the authorities agree that equity will not enjoin the publication of a libel which affects merely the personal character of the plaintiff. But some cases have held that equity would take jurisdiction, and enjoin the publication, where the libellous statement related to the business of the plaintiff or to his financial standing, and so directly injured him in his property, as where it was said of a merchant that he sold bad goods or was insolvent, or of a professional man that he was a quack or a pettifogger, etc. Of this character was *Dixon v. Holden* ;² and in another case the court went so far as to restrain striking factory hands from posting placards, not libellous, but requesting workmen to keep away from the plaintiff's factory.³ But the correctness of the decision in *Dixon v. Holden* was denied by the Vice-Chancellor in *Mulkern v. Ward* ;⁴ and subsequently the case was overruled by *Prudential Assurance Co. v. Knott*,⁵ where the court rejected the doctrine that equity

Law Reports, vol. x. p. 199, the plaintiff, who had been acquitted on a trial for murder, obtained an injunction restraining the defendants from exhibiting his statue in wax, which was so placed in their gallery as to convey an innuendo that the plaintiff was a murderer.

An acute essay, by Mr. Herbert Spencer Hadley, denying the "right to privacy," will be found in the *Northwestern Law Review*, vol. iii. p. 1.]

¹ *Peabody v. Norfolk*, 98 Mass. 452.

² L. R. 7 Eq. 488.

³ *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 551.

⁴ L. R. 13 Eq. 619.

⁵ L. R. 10 Ch. App. 142. [The interference of equity by means of an injunction, in cases of strikes, is becoming an important part of its jurisdiction. An objection to such interference has been made in some cases on the ground that an injunction never issues to restrain the commission of a crime. But this rule is now, at least, limited to those cases where the threatened injury is to the public, and not especially to any individual or corporation : *Toledo A. A. & N. M. Ry. Co. v. Pennsylvania Co.* 54 Fed. Rep. 730, 744. Where such special injury is threatened, and the evidence shows that it would be irreparable (in the sense indicated in the text), or that it could be recompensed at law only

will take jurisdiction over a libel on the ground that it injures property, or is directed against the business of the plaintiff, his personal character not being affected.

by means of a multiplicity of suits, equity will intervene: *Cœur D'Alene Mining Co. v. Miners' Union*, 51 Fed. Rep. 260; *Blindell v. Hagan*, 54 Fed. Rep. 40; *Emack v. Kane*, 34 Fed. Rep. 46.

In several important cases, equity has taken jurisdiction to restrain a violation of the Interstate Commerce Act, which requires every railroad to receive and transport freight delivered to it by another; failure to do so on the part of the agents or employees of the railroad being made a misdemeanor. (See 24 Stat. at Large, p. 379; 25 Stat. at Large, p. 855.) Under this act, the chief of the Brotherhood of Locomotive Engineers was enjoined from directing the engineers of a railroad company not to handle cars delivered by another company whose engineers were on strike: *Toledo A. A. & N. M. Ry. Co. v. Pennsylvania Co.* *supra*. See, also, *Waterhouse v. Comer*, 55 Fed. Rep. 149.

It has been held that such a refusal to handle freight in the course of interstate transportation is also a violation of the law against trusts and monopolies (26 Stat. at Large, p. 209). This law is entitled "An act to protect trade and commerce against unlawful restraints and monopolies," and the material part of it is as follows: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal." To hold that a strike, the

incidental effect of which is to hinder trade and commerce, comes within this act, seems preposterous; but it was so decided in *United States v. Workingmen's Amalgamated Council*, 54 Fed. Rep. 994; and in *Waterhouse v. Comer*, *supra*. *Contra*, *United States v. Patterson*, 55 Fed. Rep. 605.

The receiver of a railroad or other corporation appointed by the court is considered to be an officer of the court; and the court itself, so long as the receivership continues, is in full control of the property, with power, of course, to raise or to reduce wages. Such being the case, it has been thought by some judges that the employees of a receiver were under obligations more strict than those which obtain in the case of an ordinary employer. But this is not the law. *In re Higgins*, 27 Fed. Rep. 443, *Pardee, J.*, said: "The employees of the receiver, although *pro hac vice* officers of the court, may quit their employment, as can employees of private parties or corporations, . . . but they must quit peaceably and decently." See, also, *United States v. Kane*, 23 Fed. Rep. 748; *Ames v. Union Pacific Ry. Co.* 60 Fed. Rep. 674.

To obtain an injunction it is not necessary to prove actual violence on the part of the strikers. In the case last cited, *Brewer, J.*, charged the jury that the question was, "whether these parties went there simply as persons have a right to do, to request engineers and trainmen to desist from further labor, or whether they went there, under the

In *Clark v. Freeman*¹ the evidence showed that the defendant advertised to sell pills made by the complainant, who

circumstances, with such a demonstration of force, with such an attitude and an air, that, although nothing but a request was expressed, it was a request which men did not dare decline to comply with." See, also, *Rex v. Selshy*, 5 Cox C. C. 495, note; *Regina v. Druitt*, 10 Cox C. C. 592; *In re Wabash Ry. Co.* 24 Fed. Rep. 217; *People v. Wilzig*, 4 N. Y. Crim. Rep. 403. In *Sherry v. Perkins*, 147 Mass. 212, the defendants were enjoined from displaying in front of the plaintiff's shoe factory a banner stating that there was a strike in the factory, and requesting lasters to keep away from it. It was proved that this was part of a scheme of intimidation and violence on the part of the defendants, otherwise the decision could not be justified. See, also, *Casey v. Cincinnati Typographical Union*, 45 Fed. Rep. 135, the case of a boycott.

It seems to be assumed in many cases that the employees of railroad and other public or semi-public corporations are under a special obligation to the public. Thus it was said in an early case, which is often cited, that "a combination is criminal wherever the act to be done has a necessary tendency to prejudice the public." *Commonwealth v. Carlisle*, Brightly's Rep. (Penn.) 36, 40. And in a recent case the court said: "You have no right to go into a strike and undertake . . . to stop the running of the cars of the country." In *Farmer's Loan & Trust Co. v. Northern Pacific Ry.*

Co. 60 Fed. Rep. 803, the court reasserted this principle, and declared that, in view of the United States statutes cited above, there could be no such thing hereafter as a lawful strike upon a railroad. But these statements are greatly exaggerated. The law upon this point was correctly laid down in *Regina v. Bunn*, 12 Cox C. C. 316, 338, as follows: "You must not allow yourselves to be influenced, in coming to a conclusion whether these defendants are guilty or not, by the view that, from there being an agreement between the defendants to cease work, it would have had a most lamentable effect upon the city and the public. I entirely agree that, so far as these men were the servants of the gas company, they had no obligation whatever with regard to the public; that they had no greater obligation to the public than anybody else had, than any of us. They had entered into no agreement with the public; the public paid them nothing for their labor; and they were under no further obligation to the public than any other of the Queen's subjects."

The only duty which railroad or other employees have toward the public is the duty which rests upon every individual, namely, to refrain from any act or omission to act, the natural or probable effect of which would be a direct injury to some person or persons. A farm servant who was leading a vicious bull through the streets of a town would have no right to quit his master's

¹ 11 Beav. 112.

was an eminent physician. The bill alleged injury to his practice by this false publication, but an injunction was refused.

839. In England, however, it is now settled that, under the Judicature Act,¹ courts of chancery may enjoin not only libellous publications, but also oral slanders affecting one's business. But this jurisdiction is based entirely upon the special terms of that act.²

840. In the United States the doctrine of *Prudential* service at that precise moment, leaving the bull at large. And so a locomotive engineer has no right to quit his engine and train in the middle of a prairie. But the fact that a strike upon a railroad will cause great loss and damage to the public, as well as to the corporation, is no ground for enjoining the strike.

Since the foregoing note was written, an opinion has been rendered in *Arthur v. Oakes*, 63 Fed. Rep. —, which establishes the propositions just stated. In that case the Circuit Court of Appeals modified the injunction granted in *Farmers' Loan & Trust Co. v. Northern Pacific Ry. Co.* 60 Fed. Rep. 803, by striking out the following clause: "And from so quitting the service of the said receivers, with or without notice, as to cripple the property, or prevent or hinder the operation of said railway." The following clause was approved: "And from combining and conspiring to quit, with or without notice, the service of said receivers, with the object and intent of crippling the property in their custody, or embarrassing the operation of said railway." But the court substantially qualified this clause by saying that it meant only acts of violence, such as the disabling of locomotives, and

acts of intimidation. Finally, the court declared it to be the right of the employees, "without reference to the effect upon the property or upon the operation of the road, to confer with each other upon the subject of the proposed reduction in wages, and to withdraw in a body."

In a recent case in Massachusetts (*Worthington v. Waring*, 157 Mass. 421), certain operatives at Fall River, who had struck work, prayed for an injunction against their former employers, restraining them from putting the names of the plaintiffs upon a "black list," and sending it to other manufacturers in Fall River, in order to prevent the plaintiffs from getting work at any mill in that city. The bill alleged a conspiracy among the mill-owners to this effect, and prayed that the defendants should be ordered to withdraw and destroy the "black list." The bill was dismissed, mainly on technical grounds, and with a very inadequate discussion of the principle involved.]

¹ 36 & 37 Victoria, ch. 66.

² *Loog v. Bean*, L. R. 26 Ch. D. 306, 316; *Thorley's Cattle Food Co. v. Massam*, L. R. 14 Ch. D. 763; *Thomas v. Williams*, L. R. 14 Ch. D. 864; [*Collard v. Marshall* [1892], 1 Ch. 571.]

Assurance Co. v. Knott, *supra*, is strictly maintained, namely, that a false and injurious statement respecting the plaintiff's business cannot be enjoined in equity, but the party must seek his relief at law.¹

Injunctions against Proceedings at Law.

841. A court of equity has no power to supervise the decisions or the proceedings in a court of law; but it is able, nevertheless, in many cases, to control suits at law by bringing its process to bear upon the suitors. Equity has this power because it deals primarily, not with property, but with persons. Its decrees operate *in personam*, so that it can compel a party to pursue or to abstain from a certain line of conduct. Thus it may enjoin a party from prosecuting a certain suit, or from setting up a certain defence at law, or from enforcing a judgment recovered at law. In all of these cases the ground of interference by equity is that the party in whose favor it acts has some clear right, of which, either from the nature of the right itself, or from the peculiar circumstances of the case, he has had no opportunity to avail himself in the suit at law.

I have treated of this subject already, but I will add or repeat here (1) that equity will enjoin a suit at law whenever the defendant has a defence which is not available or

¹ *Boston Diatite Co. v. Florence Manuf. Co.* 114 Mass. 69; *Whitehead v. Kitson*, 119 Mass. 484; *Raymond v. Russell*, 143 Mass. 295; *Kidd v. Horry*, 28 Fed. Rep. 773; *Baltimore Car-wheel Co. v. Bemis*, 29 Fed. Rep. 95; [*Singer Manuf. Co. v. Domestic Sewing-machine Co.* 49 Ga. 70; *Life Association v. Boogher*, 3 Mo. App. 173; *Brandreth v. Lance*, 8 Paige, 24; 3 *Pomeroy's Eq.* § 1358. *Contra*: *Emack v. Kane*, 34 Fed. Rep. 46. This is a case of much significance. The defendant, a manufacturer of patented slates for school children, was restrained from issuing trade circulars in which he threatened to bring suits for infringement of his patent against all dealers who sold slates made by Emack, his rival in the business. The court found that the threat was not a *bonâ fide* one, inasmuch as the defendant knew that he had no legal basis for bringing the threatened suits. On this ground the case was distinguished from *Kidd v. Horry*, *supra*. See, also, *Grand Rapids Co. v. Haney* Co. 92 Mich. 558. If circulars are issued in good faith, announcing a real intention to sue for infringement, equity will not interfere: *Bell v. Singer Co.* 65 Ga. 452. See, also, *Myers v. Devries*, 64 Md. 532.]

competent at law, but which is a good defence in equity.¹ Thus, if the suit at law is upon a promissory note or other written contract, the defence being that the instrument contains an important mistake, that defence cannot be made; for at law a written instrument cannot be varied by parol evidence. But in equity such a mistake can be shown. A court of equity will therefore enjoin the plaintiff from prosecuting his suit at law until the mistake is corrected; otherwise the defendant would be without remedy.

842. But whenever the defence is just as available at law as in equity, a court of equity will not enjoin prosecution of the suit at law.² Thus, in the case supposed, if the defence be that the note was obtained by fraud, that defence being equally good at law and in equity, a suit at law upon the note would not be enjoined.

843. (2) So, also, equity will enjoin a defendant from setting up a strictly legal defence whenever he is equitably estopped from availing himself of that defence.³

844. JUDGMENTS AT LAW. — A court of equity will enjoin the enforcing of a judgment at law in two cases: (1) When the judgment was obtained by the fraud of the other party; (2) When the party has some good defence in law or equity of which, without his negligence or fault, he was not able to avail himself in the suit at law.

As to the first case, since a judgment at law is conclusive upon the parties to it, it is incompetent for either party to set up as a defence at law that the judgment was obtained by fraud. But in equity this constitutes a good defence. The estoppel at law does not operate there, and therefore

¹ [*Atlantic De Laine Co. v. Tre-dick*, 5 R. I. 171.]

² *Grand Chute v. Winegar*, 15 Wall. 373; [*Fuller v. Cadwell*, 6 Allen, 503; *Derbyshire Co. v. Serrell*, 2 De G. & Sm. 353; *Bank of Bel-lows Falls v. Rutland, &c. R. R. Co.* 28 Vt. 470; *Imperial Fire Ins. Co. v. Gunning*, 81 Ill. 236; *Manchester Fire Assurance Co. v. Stockton, &c. Works*, 38 Fed. Rep. 378;

Chase v. Chase, 50 N. J. Eq. 143; *Westminster v. Willard*, 65 Vt. 266.]

³ [*Woodbury Bank v. Charter Oak Ins. Co.*, 31 Conn. 517.] By acts of 1883, ch. 223, § 14, equitable defences to a limited extent are allowed in Massachusetts. See *Nott v. Sampson Manuf. Co.* 142 Mass. 479; *Sherman v. Galbraith*, 141 Mass. 440.

equity will enjoin the fraudulent party from availing himself of the fruits of his own fraud.¹ I have already considered, under the head of fraud, what constitutes fraud sufficient to avoid a judgment; and I have also stated that this rule applies only to domestic judgments.²

845. The second class of cases are those where a party had a good defence to the suit at law, but from ignorance, mistake, or accident,³ not attributable to his own negligence, he failed to avail himself of it. Here no fraud is imputed to the other party. In these cases the indispensable requisite is, that the party seeking relief should not have been guilty of any laches or misconduct.⁴

The rule was stated by Chief Justice Marshall in *Marine Insurance Co. v. Hodgson*:⁵ "It may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery."

Furthermore, the time must have passed for moving for a new trial; otherwise that would be the proper remedy, and relief in equity would be unnecessary and improper.⁶

¹ [Hager v. Buechler, 6 Ill. App. 504; Owens v. Ranstead, 22 Ill. 462; Wingate v. Haywood, 40 N. H. 161; Wagner v. Shank, 59 Md. 437; Gainty v. Russi, 40 Conn. 450; 313; Herbert v. Herbert, 49 N. J. Dobson v. Pearce, 12 N. Y. 156; Eq. 70; Mechanics' Bank v. Barnet Scrivin v. Hursh, 39 Mich. 98; Manuf. Co. 33 N. J. Eq. 486.]
Baker v. Redd, 44 Iowa, 179. See, also, Long v. Thayer, 150 U. S. 520.]

² [*Supra*, p. 45 and p. 76.]

³ [Such as illness, inability to procure evidence, ignorance that the suit had been brought, etc. See Hibbard v. Eastman, 47 N. H. 507; Fanning v. Dunham, 5 Johns. Ch. 122; Powers v. Butler, 4 N. J. Eq. 465; Given's Appeal, 121 Pa. St. 260; Stowell v. Eldred, 26 Wis.

⁴ [English v. Aldrich, 132 Ind. 500; Emerson v. Udall, 13 Vt. 477; Mayor of New York v. Brady, 115 N. Y. 599; Hiles v. Mosher, 44 Wis. 601; Carolus v. Koch, 72 Mo. 645.]

⁵ 7 Cranch, 33. See, also, Hendrickson v. Hinckley, 17 How. 443; Crim v. Handley, 94 U. S. 652; McBride v. Little, 115 Mass. 308.

⁶ [See 3 Pomeroy's Eq. § 1365.]

846. Equity will also enjoin the exercise of an alleged legal right when its exercise would result in irreparable injury to the party seeking relief.

A single illustration will suffice. A creditor of A attached a stock of goods in the hands of B, alleging that they were the property of A, and that they had fraudulently been conveyed to B. A bill was brought by B, setting forth that the goods were his own, that he had just started in trade, and that the seizure and sale of the goods would be destructive to his business and credit, and that no damages which he could recover at law for the value of the goods would compensate him for the injury. The court took this view of the case, and sustained the bill on the ground that, under the circumstances, the injury would be irreparable; for in a suit at law no damages could be recovered by B for the loss of his trade and the destruction of his credit, since these would be collateral and consequential injuries for which a court of law could not award compensation.¹

There is a strong flavor of justice about this decision. It would indeed be a mockery to remit a party, whose property is seized by attachment as the property of another person, to a court of law. In that court, if the attaching creditor had acted in good faith, the plaintiff could recover only the fair value of the goods seized, and he would be wholly without remedy for the greater loss consequent upon the interruption to his business and the injury to his credit. It is doubtful, however, how far this case would be followed in Massachusetts, where the law permits property to be attached upon beginning a suit.

847. When, pending litigation concerning the title to real estate, one of the parties threatens or undertakes to do any act which will work irreparable injury to the estate (such as cutting down trees or extracting ores or coal), equity will enjoin him until the determination of the title. This is the modern rule, though formerly equity declined jurisdiction in such cases.²

¹ *Watson v. Sutherland*, 5 Wall. 74.

² *Erhardt v. Board*, 118 U. S. 537.

CHAPTER XXX.

BILLS OF DISCOVERY.

848. THE third distinctive equitable remedy is the bill of discovery.¹ A bill of discovery proper is a bill brought to obtain from the defendant therein a disclosure of material facts or documents to be used as evidence in another suit between the same parties.²

Every bill in equity is in one sense, as has frequently been said, a bill of discovery; that is, every such bill calls upon the defendant to make a full answer to the plaintiff's bill; but an ordinary bill in equity is brought to obtain some ultimate relief, and discovery is merely incidental to the suit. On the other hand, under a bill of discovery proper discovery is the only relief sought, and the only relief which can be obtained.³

¹ [The deficiency in the common law, which bills of discovery were intended to supply, is stated *supra*, pp. 20, 21.]

² [For the rules of pleading in respect to bills of discovery, see *infra*, pp. 519, 557, and 1 Daniell's Ch. pp. 305, 585, and notes to 6th Amer. ed. In New York, where bills of discovery are abolished, the object of the bill can substantially be accomplished through the forms of pleading prescribed by the Code: *Townsend v. Bogert*, 126 N. Y. 370.]

³ [*Dinsmore v. Crossman*, 53 Me. 441; *Metler v. Metler*, 19 N. J. Eq. 457, 461. In this country, if a bill for discovery is maintained, and it contains a prayer for special relief founded upon the discovery,

the courts as a rule will administer such relief, provided that it is within the proper jurisdiction of a court of equity. Thus, when a creditor has exhausted his remedy at law, he may maintain a bill against the debtor for discovery of assets and for relief: *Treadwell v. Brown*, 44 N. H. 551. But if, for example, the relief sought should be damages, which can be awarded only by a jury, the court would not administer it. See 1 Story's Eq. §§ 71, 72, and *supra*, p. 22. If an intended bill of discovery contains a prayer for general relief, it becomes a bill for relief: *Angell v. Westcombe*, 6 Sim. 30. For the technical differences between a bill for discovery and a bill for relief, see 2 Daniell's Ch. p. 1557, 6th Amer. ed.]

849. The requisites of such a bill are as follows: The bill must show by proper averments that the discovery is sought in aid of an existing suit, or of a suit about to be begun, or in aid of a defence to an existing suit.¹ If such averments are absent, the bill, as all the authorities agree, is demurrable.²

850. A bill of discovery lies in favor of a defendant in a suit at law to enable him to prove his defence,³ as well as in favor of a plaintiff to prove his case. Thus, for example, if the defence to a suit upon a claim was payment, the defendant in that suit would have a right to bring a bill of discovery against the plaintiff requiring him to answer whether he had not been paid, and to produce any papers or vouchers showing the settlement.

A bill of discovery may also lie in favor of a defendant in a suit in equity against the plaintiff therein. For example, if the defendant to a bill in equity should, by plea or answer, set up a release or payment, or other matter constituting a distinct defence to the plaintiff's case as distinguished from a mere denial of it, — a defence, that is, which operates by way of confession and avoidance, under such circumstances the defendant would be entitled to call upon the original plaintiff for a disclosure in support of his defence, and this could be done only by a cross-bill of discovery.

851. The bill must show some apparent right and title to the claim in respect to which discovery is sought. Equity will not refuse discovery merely because the plaintiff's title is doubtful, but will leave that question to be decided ultimately in the main suit. Where, however, it is apparent

¹ [The United New Jersey, &c. R. R. v. Hoppock, 28 N. J. Eq. 261. In the United States, as a rule, a bill of discovery may be maintained in aid of proceedings in a foreign court: *Mitchell v. Smith*, 1 Paige, 287; *Post v. Toledo*, &c. R. R. Co. 144 Mass. 341. But the rule in England is the other way: *Dreyfus v. Peruvian Guano Co.* L. R. 41 Ch. D. 151.]

² *Haskins v. Burr*, 106 Mass. 48; *Pease v. Pease*, 8 Met. 395; 2 Story's Eq. § 1483.

³ [The plaintiff in a suit for libel may be compelled to discover the truth of the alleged libel, unless by so doing he would criminate himself: *March v. Davison*, 9 Paige, 580.]

upon the face of the bill that the plaintiff has no title, and therefore no right to call upon the other side to make any disclosures in reference to the property at stake, the discovery will be refused. Equity will never encourage mere impertinent or "fishing" bills.¹

Thus, where an administrator brought a bill of discovery alleging that the defendant had fraudulently procured certain real estate from the intestate, and seeking a discovery of the facts, the court dismissed the bill because the administrator had no title to the real estate of the deceased. If the bill had been brought by the heirs at law, it would have been maintainable; and so if it had been brought by a devisee in case the deceased had devised the property after the alleged fraudulent conveyance.²

In *Bampton v. Birchall*³ a bill of discovery was brought in aid of a suit of ejectment at law. The bill showed that the defendant had been in possession more than twenty years, and consequently that the plaintiff had no title. It was therefore dismissed.

So, also, when an heir at law brings a bill of discovery, the ancestor still living, the bill will be dismissed, because he has no present title, and may never have any, inasmuch as the ancestor may devise it away.

852. The bill must show that the facts sought are within the knowledge of the defendant, and competent and material to support the plaintiff's case or defence. There must be a distinct averment that the facts or documents are within the knowledge or control of the defendant, or else no possible reason exists for calling upon him to make discovery. He cannot disclose unless he has the necessary knowledge,

¹ [So the bill will be dismissed if the discovery sought is irrelevant or scandalous, especially if it be asked for out of curiosity or malice: *Republic of Costa Rica v. Erlanger*, L. R. 19 Eq. 33; *Meek v. Witherington*, 67 L. T. 122; *Robinson v. Philadelphia, &c. R. R. Co.* 28 Fed. Rep. 340. But nothing relevant is scandalous. Questions which imply

that the defendant has committed a felony will not be struck out on the ground that they are scandalous. But the defendant may, of course, refuse to answer lest he should criminate himself: *Fisher v. Owen*, L. R. 8 Ch. D. 645.]

² *Pease v. Pease*, 8 Met. 395.

³ 11 Beav. 38.

and this the bill must clearly aver.¹ The facts or documents called for must be competent evidence upon the issues in the main suit. The court will not undertake an inquisition which would be of no practical value.

853. The evidence called for by the bill of discovery must also be material. Any competent evidence is, in one sense, material: it helps to sustain the issue upon which it bears. But the question has been raised whether the discovery asked for must not be material in the sense that the facts could not be proved in any other way. It has been said that a bill of discovery must aver that the plaintiff has no other means of proving the facts; and that if the same facts are provable by other sources of testimony, the bill cannot be sustained.

*Brown v. Swann*² apparently goes to this extent. But this is not the better opinion, and the law, I think, may be considered as settled otherwise. Discovery will not be refused because the same facts can be proved by other testimony, but discovery will be granted in order to confirm or even to dispense with such other proofs. Judge Story, who was a member of the court which decided *Brown v. Swann*, was clearly of this opinion.³

854. The rule in England is well settled, and it is thus stated by Vice-Chancellor Wigram in *Earl of Glengall v. Frazer*,⁴ "The plaintiff [in a bill of discovery] is in this court entitled to an answer from the defendant, not only in respect of facts which he cannot otherwise prove, but also as to facts, the admission of which will relieve him from the necessity of adducing proof from other sources."

In Massachusetts the rule is the same. In *Peck v. Ashley*⁵ it was held that a defendant will be compelled to make discovery if the court can perceive or presume that the discovery will help to support or defend the main suit, although there is no averment that the plaintiff cannot establish his right without the aid of the discovery sought.

¹ *Brown v. Swann*, 10 Peters, 497, 502.

² 10 Peters, 497, 502.

³ *Vide* Story's Eq. Pl. § 319, note 2.

⁴ 2 Hare, 99, 105. [See, also, *Lyell v. Kennedy*, L. R. 8 App. Cas. 217.]

⁵ 12 Met. 478.

The justice and good sense of the rule thus broadly applied are apparent. There can be no other proof in a case so conclusive as the deliberate admission under oath of the adverse party against his interest. Other evidence of the same facts derived from different sources may be controverted, but if to such evidence we can add, by the aid of a bill of discovery, the admission of the adverse party himself, then the nearest approach to certainty is reached; and such discovery should never be refused because other sources of proof are open to the plaintiff.

It is, however, to be noted that this right of discovery does not obtain where the facts sought are as open and accessible to the plaintiff as to the defendant; as, for instance, are the records in a public registry of deeds or wills. There is no need of any discovery in such a case. It is only when a fact lies within the breast of the defendant, and his disclosure is necessary or helpful to prove it, that the right to a bill of discovery exists.

855. A bill of discovery will not lie if the court in which the main suit is pending has power to give the party the same discovery.¹

If a court of law, by its own machinery, is able to give plaintiff or defendant, as the case may be, the discovery from the other party which he seeks, then there is no occasion for the assistance of a court of equity. Equity acts only when its aid becomes necessary in order to give the party a remedy or redress which he cannot obtain in the proceeding at law.

Whenever, therefore, the statutes provide, as do those of the United States and those of many individual States also, that parties in suits at law may, before the trial, file interrogatories to the other side for the discovery of facts material to the case of the party interrogating, such a provision, so far as it goes, supersedes the necessity of a bill of discovery. These statutes do not take away the jurisdiction of courts of equity to entertain bills of discovery; they only affect its exercise. That is to say, the jurisdiction will not, as a rule, be exercised, provided that the statutory provision for

¹ [See *supra*, p. 21.]

examining witnesses at common law affords a means of discovery which is as satisfactory in the given case as would be a bill of discovery.

856. In England,¹ to be sure, and in some of the United States, it is held that these statutes do not have this result, and that the original jurisdiction of courts of equity to entertain bills of discovery remains unaffected by them. Such decisions are based upon the general principle that courts of equity are not ousted of any part of their jurisdiction by reason of the fact that the same relief formerly obtainable in equity alone can now be had in the common-law courts, — provided, of course, that the equitable jurisdiction is not abolished by the statute.² Still, it would probably be held by most courts of equity in this country that the statutory provision in question does away with the necessity for a bill of discovery, unless the circumstances of the particular case are such that the statutory provision would fail to afford such complete relief as could be had by a bill of discovery.³

857. Some cases have gone further than this, holding that even the right to examine an adverse party in an action at law (instead of by interrogatories filed before trial) dispenses with the necessity for a bill of discovery.⁴ But these cases, it seems to me, carry the doctrine too far. The right to call an adverse party as a witness, with all the risks and possible disadvantages of such a proceeding, is not a fair equivalent for a bill of discovery, or for the right to examine the party by interrogatories before the trial. The great difference between these proceedings is this: The party who files the bill of discovery in equity, or the interrogatories at law, is not obliged to read at the trial the answer or answers which he receives. He may do so or not, as he pleases, and the party answering cannot compel him to read them; nor is he in any way concluded by them. Whereas, if for want of a bill of discovery he is driven to put his

¹ Snell's Eq. p. 590.

² [See *supra*, p. 21 and note 1.]

³ *Post v. Toledo, &c. R. R. Co.*
144 Mass. 341.

⁴ *Heath v. Erie Ry. Co.* 9 Blatch.

316; *Drexel v. Berney*, 14 Fed.
Rep. 268; *Markey v. Mutual Ben-*
efit Life Ins. Co. 3 Law & Eq.
Rep. (New York) 647.

adversary upon the stand as a witness called by himself, the answers given are testimony in the case, however disastrous they may be to the party interrogating. Moreover, a bill of discovery puts the party who files it in possession of such facts as the answer discloses, in a reasonable time before the trial at law. Thus he is enabled either to dispense with further evidence of the same character, or to supply what the answer withholds.¹

The bill of discovery, therefore, affording a much more complete remedy than the right to examine an adverse party as a witness at the trial, ought not, I think, to be superseded by a statutory provision giving that right; and it is so held in the recent case of *Colgate v. Compagnie Française*.²

858. OF WHAT IS A PARTY ENTITLED TO DISCOVERY. — A party is entitled to discovery of all such facts material to his case as are well pleaded in the bill; but he is not entitled to discovery relating exclusively to the defendant's case, or to the evidence by which the defendant's case is to be supported.³ So far as I know, the rule just stated is universal, except perhaps in Massachusetts. In *Adams v. Porter*⁴ it was held that the English rule upon the subject does not apply in Massachusetts, and in that case a bill seeking discovery as to the defendant's title solely was maintained. The question arose again in *Haskell v. Haskell*,⁵ where the court held, "without impugning the English rule," that the bill could be maintained.⁶

¹ [*Smythe v. Henry*, 41 Fed. Rep. 705, 715; *Slater v. Banwell*, 50 Fed. Rep. 150; *Attorney-General v. Gas-kill*, L. R. 20 Ch. D. 519.]

² 23 Blatch. 86. [In harmony with *Colgate v. Compagnie Française* are: *Wood v. Hudson*, 96 Ala. 469; *Kendallville Refrigerator Co. v. Davis*, 40 Ill. App. 616; *Union Passenger Ry. Co. v. Baltimore*, 71 Md. 238; *Russell v. Dickeschied*, 24 W. Va. 61; *Millsaps v. Pfeiffer*, 44 Miss. 805; *Shotwell v. Smith*, 20 N. J. Eq. 79. *Contra*, in harmony with *Heath v. Erie Ry. Co. supra*,

are: *Rindskoff v. Platto*, 29 Fed. Rep. 130; *Paton v. Majors*, 46 Fed. Rep. 210; *McCreery v. Cobb*, 93 Mich. 463; *Chapman v. Lee*, 45 Ohio St. 356.]

³ *Wigram on Discovery*, §§ 26, 27; *Young v. Colt*, 2 Blatch. 373; [*Bellows v. Stone*, 18 N. H. 465, 483.]

⁴ 1 Cush. 170.

⁵ 3 Cush. 540. [See, also, *Wilson v. Webber*, 2 Gray, 558, 562.]

⁶ [See 1 Daniell's Ch. Pr. 580, note to 6th American ed.]

859. Let us notice the essential elements of this rule. The discovery sought must be in aid of the plaintiff's case, *i. e.* the plaintiff in the bill of discovery. He may be either plaintiff or defendant in the suit at law. What constitutes the plaintiff's case? It is that issue upon which he relies, as plaintiff or defendant, to sustain or defeat the suit at law. Every suit at law is supposed to be reduced by the pleadings to one or more issues of fact, asserted on the one side and denied on the other, upon the determination of which the case depends. The final issue to which the case is brought may be one set up by the defendant, and thus, although the suit was brought by A, the plaintiff, its decision may turn upon some new issue of fact set up by B, the defendant. For example, the suit is brought by A upon a promissory note given by B. B pleads that the note is void, because he was a minor when he gave it. A replies that B, after coming of age, ratified the note, and promised to pay it. B rejoins that the ratification was procured by the fraud of A. Here, then, the final issue upon which A's right to recover turns is, whether or not B was induced by fraud to ratify the note. Now B may bring his bill of discovery to obtain from A any facts in support of his defence that the ratification was fraudulently procured; but in so doing he should be careful to set forth this issue as the issue in the case raised by him, and material to his defence. Or, to take a simpler example: Suppose an action on a note by A, to which B pleads payment or a release. B is entitled to a bill of discovery against A of any facts to prove the payment in the one case, or the release in the other. But in each case the bill must distinctly show the issue existing in the suit at law, and hence the materiality of the proposed discovery.

So, also, where the plaintiff brings an action at law for the recovery of real estate to which the defendant sets up title in himself by deed from the plaintiff, and the plaintiff's reply is that the deed was procured by fraud and without consideration. Here the issue is the fraud of the defendant in procuring the deed, and the bill should clearly set forth this fact; otherwise any inquiry as to the defendant's title would apparently be contrary to the rule that dis-

covery can be had only in reference to the title or claim of the party seeking the discovery.¹ But in the case supposed the defendant, although wholly denying the plaintiff's title to the land, could not have a bill of discovery to inquire into the facts relating to the plaintiff's title, or for the purpose of impeaching it.

860. It is no objection, however, to the discovery sought that it also concerns the defendant's title, if it furnishes evidence in support of the plaintiff's title.²

The objection, that the discovery sought concerns the defendant's case exclusively, should be made specially by demurrer or plea; otherwise it will be deemed to be waived.

861. LIMITATIONS OF THE RIGHT TO DISCOVERY.—Whenever a plaintiff claims discovery of facts by virtue of some title or relation, a plea in bar denying the existence of such title or relation is a good answer to the discovery.

Thus, if the plaintiff sets forth that the defendant was his agent or attorney, and asks for a discovery of accounts, papers, etc., in his hands as such attorney, the defendant may by plea deny the title upon which the plaintiff's bill rests. He may deny, namely, that he is or was the plaintiff's attorney, or that he ever sustained any fiduciary relation to him by virtue of which he came into the possession of any books or papers.³

In other words, a defendant will not be compelled to render accounts or make discovery until the plaintiff's title to such discovery is established; and a plea denying the title is a good answer to the discovery. This is true of all suits in equity for discovery or for account.

But if any discovery is sought in support of the alleged title, such discovery must be given, and a plea denying the title is no reason for withholding evidence in support of the title.⁴

862. Whenever a bill of discovery is brought in aid of a

¹ Wigram on Discovery, § 99.

³ Adams v. Fisher, 3 Myl. & Cr.

² Gaines v. Mauseaux, 1 Woods, 526.

118; Smith v. Duke of Beaufort, 1 Hare, 507.

⁴ Thring v. Edgar, 2 Sim. & St. 274. 280.

suit at law, any plea in bar which would be a good defence in such suit, by way of confession and avoidance, is also a good defence to the discovery.

This, in substance, is the result arrived at by Wigram after a critical review of the cases.¹ For instance, if a suit at law is brought to recover a debt, and a bill of discovery is filed in aid of that suit, the defendant may plead in bar to the discovery that the plaintiff's alleged debt is barred by the statute of limitations, and therefore he is entitled to no discovery; or the defendant may plead that the plaintiff has granted him a release. It is very important, however, to keep in mind this distinction: In all these supposed cases, and in every other case where a plea in bar to the discovery is set up, the plaintiff, by properly framing his bill, is always entitled to a discovery of facts affecting the truth of the plea in bar. Thus, although a defendant may decline to discover facts bearing upon the plaintiff's original claim by pleading a release, he cannot shut out the plaintiff from a discovery of the facts bearing upon the validity of the release, if the plaintiff has taken the precaution to set forth in his bill that the defendant relies upon such a release, but that the same was procured by fraud, or is void for any other reason. Hence the advantage of the "charging" part of the bill, which, as I have stated already, anticipates and replies to the defendant's answer.

863. The plea that the defendant is a *bonâ fide* purchaser for value is held to be a good plea to any bill of discovery which seeks to impugn the defendant's title.

But here, again, the defendant may be compelled to disclose any facts showing that he had notice, or that for any other reason he was not a *bonâ fide* purchaser for value.

864. Discovery cannot be had:—

(a) Of confidential communications between counsel and client.²

¹ Wigram on Discovery, § 78.

² Wigram on Discovery, § 136; [Foster v. Hall, 12 Pick. 89; Chirac v. Reinicker, 11 Wheat. 280, 294; Connecticut Life Ins. Co. v. Schae-

fer, 94 U. S. 457. See, especially, Edison Electric Light Co. v. United States Electric Lighting Co. 44 Fed. Rep. 294. Under this rule a client as well as his counsel can

- (b) Of disclosures by husband or wife.
- (c) Nor as to any fact tending to criminate the defendant.¹
- (d) Nor will a bill of discovery lie to enforce a penalty or

refuse to divulge what passed between them : *Nias v. Northern, &c. Ry. Co.* 3 Myl. & Cr. 355 ; *Jenkyns v. Bushby*, L. R. 2 Eq. 547 ; *State v. White*, 19 Kan. 445 ; *Bray on Discovery*, p. 352. The relation must be subsisting at the time of the communication in question ; a past relation of the sort is not sufficient : *Yordan v. Hess*, 13 Johns. 492. As to who is an attorney in this sense, see *Coon v. Swan*, 30 Vt. 6 ; *Goltra v. Wolcott*, 14 Ill. 89 ; *Bray on Discovery*, p. 377, where the English cases are collected ; *Brungger v. Smith*, 49 Fed. Rep. 124 ; *Holman v. Kimball*, 22 Vt. 555 ; *Schubkagel v. Dierstein*, 131 Pa. St. 46 ; *Barnes v. Harris*, 7 Cush. 576. The communication need not be made in contemplation of litigation in order to be privileged : *Minet v. Morgan*, L. R. 8 Ch. D. 361.

The communication will not be privileged if it was made in furtherance of a fraud or crime, for, as was remarked in one case, "no court can permit it to be said that the contriving of a fraud can form part of the professional occupation of an attorney or solicitor," — *à fortiori* of counsel : *Follett v. Jefferyes*, 1 Sim. (N. S.) 1, 17 ; *Matthews v. Hoagland*, 48 N. J. Eq. 455 ; *Tyler v. Tyler*, 126 Ill. 525. See, also, *Regina v. Cox*, 14 Q. B. D. 153. But this rule is limited to cases where the party is tried for the crime in furtherance of which the communication was made : *Alexander v. United States*, 138 U. S. 353, 360. If the matters in question have come to the attorney's knowledge from another source, as well as from

his client, he may be compelled to disclose them : *Kennedy v. Lyell*, L. R. 23 Ch. D. 387, 407. And so of transactions between his client and a third person, which take place in his presence, but as to which he is not consulted : *Patten v. Moor*, 29 N. H. 163 ; *Hanson v. Bean*, 53 N. W. Rep. 87. When an attorney has been consulted by two persons jointly who afterward go to law with each other, either may compel a discovery of the communication : *Hurlburt v. Hurlburt*, 128 N. Y. 420. An account, from short-hand notes or otherwise, of what took place in open court is not a privileged document, and its production may be demanded by the adverse party : *Robson v. Worswick*, L. R. 38 Ch. D. 370. See, also, *Learoyd v. Halifax Banking Co.* [1893] 1 Ch. 686. A client cannot make documents privileged by handing them to his counsel : *Edison Electric Light Co. v. United States Electric, &c. Co.* 44 Fed. Rep. 294. A third person who overhears the confidential communication between client and counsel may be compelled to disclose it : *Goddard v. Gardner*, 28 Conn. 172 ; *Hoy v. Morris*, 13 Gray, 519.]

¹ *Ocean Ins. Co. v. Fields*, 2 Story's R. 59 ; [*East India Co. v. Campbell*, 1 Ves. Sen. 246 ; *Paxton v. Douglass*, 19 Ves. 225 ; *Currier v. Concord R. R.* 48 N. H. 321, 331 ; *Dennison v. Yost*, 61 Md. 139. But a party may be compelled to make discovery of any act, however disgraceful, which is not an offence against the laws : *Story's Eq. Pl.* §§ 595, 596.]

forfeiture, or if it will expose the defendant to such penalty or forfeiture.¹

865. If the bill waives the defendant's oath, it cannot be maintained as a bill of discovery. The very pith and marrow of a bill of discovery is that it searches the defendant's conscience when he is under the most solemn obligations to speak the truth. If the plaintiff voluntarily waives defendant's oath, he waives what is essential in the proceeding, and his bill will therefore be dismissed as a bill of discovery.²

866. A bill of discovery cannot be brought against one who is not a party in the original suit, but who is merely a witness, and may be examined as such.

There is one apparent exception to the rule last stated. It is now settled that where one of the parties to the main suit is a corporation, and discovery is sought against it, such officer of the corporation as is presumed by reason of his official position to have knowledge of the facts, or custody of the papers sought to be disclosed, may be joined as a party defendant, and compelled to answer under oath. Judge Story, although doubting the original correctness of this rule, says: "It is now so firmly established that it is, practically speaking, impossible to overturn it."³ But discovery from an officer of a corporation cannot be required as to facts which he learned before he became, or after he ceased to be, an officer of the corporation.⁴

¹ *Atwill v. Ferrett*, 2 Blatch. 39; *Finch v. Rikeman*, 2 Blatch. 301; [*Chapman v. Ferry*, 12 Fed. Rep. 693; *Snow v. Mast*, 63 Fed. Rep. 623. In *Cooke v. Turner*, 14 Sim. 220, the defendant was protected from answering as to a testator's sanity, on the ground that by the will he was to forfeit an estate if he disputed the testator's competency to make a will. But if the plaintiff has authority to waive the penalty or forfeiture, and does waive it in his bill for discovery, the bill may be maintained: 2 Story's Eq. § 1494, note 1.]

² *Ward v. Peck*, 114 Mass. 121; *Badger v. McNamara*, 123 Mass. 117; [*Huntington v. Saunders*, 120 U. S. 78; *Manchester Fire Assur. Co. v. Stockton Harvester Works*, 38 Fed. Rep. 378. But a bill for discovery and relief may waive the defendant's oath: *Uhlman v. Arnholt*, 41 Fed. Rep. 369.]

³ 2 Story's Eq. § 1501; *Glascott v. Copper Miners' Co.* 11 Sim. 305; *Kittredge v. Claremont Bank*, 1 Woodb. & M. 244; *Post v. Toledo, &c. R. R. Co.* 144 Mass. 341.

⁴ *McComb v. Chicago, &c. R. R. Co.* 7 Fed. Rep. 426.

CHAPTER XXXI.

EQUITABLE PARTIES AND DEFENSES.

867. WE have now reached the third and last main division of our subject, where equitable jurisdiction arises, not from the subject-matter, nor from the peculiar remedy sought, but from the nature of the parties to the controversy. There are certain parties who, on account of their character or relation to one another, or of their very number, cannot maintain a suit at law; and yet they may have important interests in property, or rights under contracts, which require the protection of the law, but which would be without such protection were it not for the aid of a court of equity.

These equitable parties, as I have termed them, — that is, parties who can sue only in equity, — may be divided into three classes: (1) Married women, — husband and wife; (2) Partners; (3) More than two persons, all having interests in the same matter, which are distinct, and therefore not adjustable in one suit at law.

Married Women. — Husband and Wife.

868. At the common law a wife could not possess personal property independently of her husband.¹ But in equity, through the intervention of a trustee, she can hold personal as well as real estate to her separate use.

It was formerly supposed that, in order to secure this separate and independent equitable right, the intervention of a trustee to hold the legal title was absolutely necessary.² But in *Jones v. Clifton*³ it was held that, even where a husband made a conveyance of real estate, or of some purely

¹ [This has been changed by statute in most of the States. See 125.]

Mass. Pub. Stats. ch. 147, and, for the other States, 2 Pomeroy's Equity, § 1099.]

² [Harvey v. Harvey, 1 P. Wms

³ 101 U. S. 225.

equitable right or interest, directly to the wife by way of settlement, equity would uphold the settlement and treat the husband as a trustee.¹ And Judge Story lays it down unequivocally that, when the intention is clear to give the property to the wife for her sole and separate use, equity will maintain her right as against her husband and his creditors, although the conveyance is made to her directly without a trustee, and equity will treat the husband as her trustee for the purpose.²

869. There are three important incidents attached to the capacity of a married woman to hold property to her separate use in equity: (1) She may sue or be sued in equity in reference to this property. She may sue her husband, as well as third parties, whenever he does anything conflicting with her equitable right of property.³

"The old doctrine was that, where property was settled to the separate use of the wife, she became, as regarded that property, in all respects a *feme sole*."⁴

(2) She may ordinarily give, convey, or devise this equitable property, unless restricted by the terms of the instrument creating her equitable estate.⁵

(3) The property is liable in equity for the payment of her debts.⁶

¹ [Thompson v. Allen, 103 Pa. St. 44. So where the gift was of money: Cummings v. Friedman, 65 Wis. 183. See, also, Templeton v. Brown, 86 Tenn. 50.]

² 2 Story's Eq. § 1380. In Massachusetts (Pub. Stats. ch. 147, § 3), direct transfers of property by husband to wife are prohibited, excepting gifts of certain personal property to an amount not exceeding \$2,000. [Sanford v. Finkle, 112 Ill. 146; Botts v. Gooch, 97 Mo. 88. The intent to give all to the wife, excluding the husband, must be clear: Vail v. Vail, 49 Conn. 52. A mortgage of real estate from husband to wife, given for a valuable consideration, was held good in equity: Chadbourne v. Gilman, 64 N. H. 353.]

³ [In Massachusetts a married woman can have no relief in equity on account of money loaned to her husband: Clark v. Patterson, 158 Mass. 388.]

⁴ Butler v. Butler, L. R. 16 Q. B. D. 374, 377; [Peacock v. Monk, 2 Ves. Sr. 190.]

⁵ 2 Story's Eq. § 1390; [Fettiplace v. Gorges, 1 Ves. 46; Lechmere v. Brotheridge, 32 Beav. 353; Taylor v. Meads, 4 De G., J. & S. 597. See further on this subject, Radford v. Carwile, 13 W. Va. 572, and 2 Pomeroy's Eq. §§ 1104-1106, and notes.]

⁶ Forbes v. Lothrop, 137 Mass. 523; 2 Story's Eq. §§ 1397-1399; [Shelton v. Hadlock, 62 Conn. 143; Warren v. Freeman, 85 Tenn. 513.]

870. It has been said that the wife's separate property is not chargeable for her debts generally, but only for such debts, contracted during coverture, as she intended to make a charge upon her separate estate. This perhaps in one sense is true. Her separate private property is not chargeable with any debts contracted by her before marriage, and only with those contracted during coverture which it may be presumed she intended to make a charge upon her property. But, in the absence of anything to the contrary, the modern tendency is to hold the mere fact that the debt was contracted during coverture as *primâ facie* evidence of an intention to charge her separate estate.¹

871. MARRIAGE SETTLEMENTS. — A settlement made upon the wife by the husband before marriage is valid, the marriage being deemed a good and sufficient consideration.²

So, also, a settlement made after marriage, if made in pursuance of an agreement in writing entered into prior to the marriage, is valid against the husband and his creditors.³ Indeed, equity will compel the husband to perform such an agreement and to make the settlement, should he refuse so to do.⁴

872. A settlement made after marriage, in pursuance of an unwritten previous agreement, is good as between the parties, — that is, as against the husband and those claiming under him ; but it has been doubted whether such a settlement must not be considered voluntary as against creditors, and so not valid as to them.⁵

The statute of frauds provides that no action shall be brought upon any agreement made in consideration of marriage unless it is in writing ; and the argument is that, as the husband could not have been compelled to make the

¹ 2 Story's Eq. § 1400.

² [Such a settlement cannot be set aside on the ground that the grantor intended to defraud his creditors, unless it can be shown further that the grantee was a party to the fraud : *Herring v. Wickham*, 29 Gratt. 628.]

³ [*Brooks v. Dent*, 1 Md. Ch. 523.]

⁴ 2 Kent's Com. 173. [See, also, *Johnston v. Spicer*, 107 N. Y. 185.]

⁵ [That it is not valid as to creditors, see *Reade v. Livingston*, 3 Johns. Ch. 481 ; *Smith v. Greer*, 8 Humph. 118. See, also, *Saunders v. Ferrill*, 1 Ired. (N. C.) 97.]

settlement, it must be treated as voluntary and therefore not good as against creditors. But, in my opinion, this reasoning is both unjust and fallacious. Marriage, it is conceded, constitutes a valuable consideration of the highest character. The wife has paid that consideration, and, although she cannot bring an action upon the parol agreement, the duty of her husband to perform it is none the less sacred. If an oral agreement is made for the sale of land, and the purchaser pays the full consideration, he cannot enforce the agreement; but if the vendor subsequently makes the conveyance, it is in one sense voluntary, *i. e.* he could not have been compelled to make it; but it is not voluntary in the sense that it was without valuable consideration, and no one could pretend that it was void as against his creditors. No true distinction exists between the two cases, except that the reason for upholding the settlement is much stronger, because the wife, upon refusal of her husband to make the settlement, could not be put *in statu quo*, whereas in the case of the purchaser he could recover his money if the vendor refused to convey.¹

873. Subject to the rights of creditors, a husband may during coverture, by the intervention of trustees, make any settlement upon the wife. And a settlement made in good faith by the husband upon his wife during coverture, if he had ample means at the time, is good as against creditors although, by unexpected reverses, he subsequently becomes insolvent.² Such a settlement is good in equity although the conveyance is made directly to the wife.³

This rule will not, however, hold true in Massachusetts, where, as I have stated, all conveyances directly by husband to wife are prohibited by statute, excepting gifts of certain personal property to a limited amount.

In *Bean v. Patterson*⁴ the court sustained a conveyance of real estate made by a husband to a trustee for the benefit of his wife, to repay her for money advanced from her separate estate, although the husband was insolvent at the time of the conveyance.

¹ See 2 Kent's Com. 173, and notes.

² Jones v. Clifton, 101 U. S. 225.

³ [See *supra*, p. 289.]

⁴ 122 U. S. 496.

Suits between Husband and Wife.

874. It is a familiar and well-settled rule of the common law that husband and wife cannot sue each other; and also that a married woman can neither sue nor be sued at law except as she is for conformity, as it is said, joined with her husband as co-plaintiff or co-defendant. No judgment can be rendered which will be operative against her.

This rule, however, does not prevail in equity whenever a suit by one against the other becomes necessary in order to vindicate some equitable right of property.

The cases in which a suit may be brought in equity by the wife against her husband may be reduced to four classes: (1) Suits to secure to the wife some right guaranteed to her under a marriage settlement, or ante-nuptial agreement, or post-nuptial settlement made in pursuance of such ante-nuptial agreement.

Under this head two cases may arise where equity will entertain a suit by the wife against her husband: (a) To compel the husband to make a settlement upon her in pursuance of his ante-nuptial agreement, if that agreement was in writing;¹ (b) Whenever such settlement has been made, to enforce and protect her rights under it, if the husband attempts to violate them.²

875. (2) The second class of cases where the wife may sue the husband in equity consists of suits by the wife to protect some equitable interest held by her to her own separate use, not derived by her under any marriage settlement, but from some third person.

(a) When such equitable interest is illegally appropriated by her husband, she may bring her bill against him. Of this class of cases, *Ayer v. Ayer*³ is an instance. There a mother had conveyed real estate to a trustee in

¹ [*Cannel v. Buckle*, 2 P. Wms. 242. In this case the agreement was by the wife.] limitations upon the right of a wife to sue her husband. [So equity will set aside an ante-nuptial settlement

² *Lady Elibank v. Montolieu*, 5 Ves. 737; 1 Daniell's Ch. Pr. 109; *Story's Eq. Pl.* § 61. See *Vanduzer* 130 Ind. 273.]

³ 16 Pick. 327. *a. Vanduzer*, 6 Paige, 366, for the

trust for the sole use and benefit of her married daughter, the plaintiff. The trustee improperly allowed the husband, without the consent of his wife, from whom he was separated, to receive the rents and profits, and she brought this bill against her husband and the trustee to enforce the trust. The bill was sustained.¹

(b) Whenever a suit in equity is necessary to protect or establish the separate property of the wife against third persons, the suit should be brought by the wife as plaintiff, by her next friend, joining her husband as a co-defendant; for, as has been said, "he may contest that it is her separate property, and the claim may be incompatible with his marital rights."²

In such cases it was formerly more or less the practice for the husband to join as co-plaintiff with the wife, but this practice is condemned by the authorities just cited.

876. (3) The third class of suits by the wife against the husband consists of bills brought by the wife to obtain what is called her equity to a settlement out of her own property.³

A husband is entitled at common law to all the personal property of his wife which she had at the time of the marriage, or which accrues to her during coverture, and also to all her choses in action reduced to his possession during coverture. If he is able to obtain possession of this property without the aid of a court of equity, by a suit at law or otherwise, then equity cannot interfere in aid of the wife, as against this common-law right of the husband.⁴ But if the husband for any reason is obliged to come into a court of equity in order to obtain possession of the property of his wife, — as, for example, if it be some equitable interest, or if her title is vested in trustees, — in every such case equity will compel him to make some equitable provision for the wife and her issue out of the property which

¹ 2 Story's Eq. § 1380, and the cases cited. See, also, *Butler v. Butler*, L. R. 16 Q. B. D. 374, 378, *supra*.

² Story's Eq. Pl. § 63; *Sigel v. Phelps*, 7 Sim. 239; *Wake v. Parker*, 2 Keer., 59.

³ [*Stevenson v. Brown*, 4 N. J. Eq. 503; *Brett v. Greenwell*, 3 You. & Coll. 230; *Tucker v. Andrews*, 13 Me. 124.]

⁴ [*Mitchell v. Sevier*, 9 Humph. (Tenn.) 146.]

he thus obtains by the aid of the court. This is called the wife's equity to a settlement out of her estate.¹ This right of the wife will be asserted, even as against the husband's assignee in bankruptcy, whenever he has to come into equity to reach any property of the wife.²

Whenever, then, a suit is brought by the husband joining the wife as co-plaintiff, or by his assignee, to recover the equitable estate of the wife, the court will require a suitable provision to be made for her.

877. But a suit may also be maintained by her for this purpose against her husband or his assignee. Judge Story says: "The doctrine is now firmly established that, whenever the wife is entitled to this equity for a settlement out of her equitable interests against her husband or his assignees, she may assert it in a suit as plaintiff by bringing a bill in the name of her next friend."³

So, also, in any suit which the husband brings against the wife in equity, either against her alone or jointly with others, to get possession of her property, her right to a settlement out of the property will be enforced.⁴

878. The proportionate allowance to the wife is not fixed by any arbitrary rule.⁵ Formerly there was a practice, amounting almost to a rule, to allow one half to the wife and one half to her husband. But Lord Cairns declared, *In re Suggitt's Trusts*,⁶ that this ancient rule had been relaxed in modern times, so as to allow the court to exercise its discretion in each particular case. In that case two thirds

¹ 2 Story's Eq. § 1405; *Sturgis v. Champneys*, 5 Myl. & Cr. 97.

² *Clark v. Hezekiah*, 24 Fed. Rep. 663. [Thus, where a husband had voluntarily settled upon his wife a reasonable part of a legacy left to her, the settlement was upheld as against the husband's creditors: *Smith v. Bradford*, 76 Va. 758. See, also, *Partridge v. Havens*, 10 Paige, 618.]

³ 2 Story's Eq. § 1414; [*Kenny v. Udall*, 5 Johns. Ch. 464; *Barron v. Barron*, 24 Vt. 375; *Poulter v.*

Shackel, L. R. 39 Ch. D. 471. This is so, even as against the husband's assignee for value: *Duval v. Farmers' Bank*, 4 G. & J. 282.]

⁴ *Boxall v. Boxall*, L. R. 27 Ch. D. 220.

⁵ [*Poindexter v. Jeffries*, 15 Gratt. 363; *Phillips v. Hassell*, 10 Humph. 197; *Green v. Otte*, 1 Sim. & St. 250. In one case the wife, being already provided for, received nothing: *Aguilar v. Aguilar*, 5 Mad. 414.]

⁶ L. R. 3 Ch. App. 215.

were given to the wife and children, and one third was given to the husband.

In *Boxall v. Boxall*, *supra*, the whole was given to the wife, her husband having deserted her and having done nothing toward her support. In *Barrow v. Barrow*¹ the same course was followed on account of the adultery and misconduct of the husband.

879. (4) The fourth instance in which a wife may sue her husband is under a deed of separation, and these suits I shall consider presently.

Every bill by a wife against her husband should be brought by her in the name of her "next friend." That is to say, the bill should state that she brings this bill "by A, B, her next friend," who should be some one competent to sue in his own name. The idea and purpose of this is, that the suit shall be under the control of the next friend in behalf of the wife, who is thus supposed to be protected from the influence and control of her husband.

If the bill is brought by the wife alone, it is demurrable.² In *Wake v. Parker*³ the husband originally joined as plaintiff with the wife as her next friend. The bill was held demurrable, but leave was given to amend it by making the husband a defendant, and by introducing a new next friend. In *Ayer v. Ayer*⁴ the bill appears to have been brought by the wife alone without any next friend, but no objection was taken, and the point apparently was overlooked.

880. SUITS BY HUSBAND AGAINST WIFE. — The husband may sue his wife in equity (1) in respect to any promise or right arising out of her separate estate.⁵ It was said by

¹ 5 De G., Mc. & G. 782. [See, also, *Dumond v. Magee*, 4 Johns. Ch. 318. In *re Cutler*, 14 Beav. 220, the husband being insolvent, the wife received the whole.]

² 1 Daniell's Ch. Pr. 109.

³ 2 Keen, 59. See, also, *Sigel v. Phelps*, 7 Sim. 239.

⁴ 16 Pick. 327.

⁵ [So, where a woman obtains by fraud a conveyance from a man

whom she subsequently marries, the conveyance will be set aside in equity, even after the marriage: *Lombard v. Morse*, 155 Mass. 136. Where money was laid out on a married woman's separate estate by her husband at her request, and on her promise to repay him, the agreement to repay was enforced in equity: *Healey v. Healey*, 48 N. J. Eq. 239.]

Cotton, L. J., in *Butler v. Butler*:¹ "I have never heard it disputed that, as the wife could sue her husband in respect of her separate estate, so he could sue her in respect of any contract binding her separate estate."

(2) In respect to any equitable right arising out of a marriage settlement, or ante-nuptial or post-nuptial agreement.²

(3) Whenever the husband seeks to recover any equitable title or interest adversely to the wife, such title or interest having been acquired by him, not as husband, but aliunde.³ And whenever his claim is adverse to her, she should invariably be made a defendant and not a co-plaintiff.⁴

(4) Under deeds of separation, shortly to be considered.

881. The Legislature of Massachusetts has made some radical changes in the relations of husband and wife, and in the rights and liabilities of married women, as fixed by the common law.⁵ All the real and personal property possessed by a woman at the time of her marriage now remains her separate property, and she may manage and dispose of it as if she were sole, except that she cannot deprive the husband of his tenancy by the curtesy without his written consent.

She may make contracts and transact business, except with her husband, as if she were sole, but the statute expressly states that it does not authorize suits between husband and wife.

Such suits, therefore, remain unaffected by the legislation of Massachusetts. The same necessity as heretofore exists for the aid of a court of equity in such cases, and I have no doubt that the equitable rules which govern this subject still prevail in that State.

882. AGREEMENTS TO LIVE APART. — It is now well settled in equity that husband and wife may covenant with each other to live separately; that such an agreement is not against the policy of the law; and that its provisions

¹ L. R. 16 Q. B. D. 374.

Hanrott v. Cadwallader, 2 Russ. &

² [*Cannel v. Buckle*, 2 P. Wms. M. 545.
242.]

⁴ *Hanrott v. Cadwallader*, *supra*.

⁵ Story's Eq. Pl. § 62; *Boxall v. Boxall*, L. R. 27 Ch. D. 220, *supra*; §§ 1-7.

⁵ Mass. Pub. Stats. ch. 147,

will be enforced in equity in a suit by the husband against the wife, as well as against the husband in a suit by the wife.

At one time such agreements were condemned as being against public policy.¹ "For a great number of years, both ecclesiastical judges and lay judges thought it was something very horrible, and against public policy, that the husband and wife should agree to live separate. . . . But a change came over judicial opinion as to public policy; other considerations arose and people began to think that, after all, it might be better and more beneficial for married people to avoid in many cases the expense and scandal of suits of divorce by settling their differences quietly by the aid of friends out of court, although the consequence might be that they would live separately, and that was the view carried out by the courts when it became once decided that separation deeds *per se* were not against public policy."²

Since the case of *Wilson v. Wilson*³ it has not been doubted that such a deed of separation is valid; and if intelligently and fairly made it is as binding upon the wife as upon the husband.

883. Where either party attempts to violate the provisions of such an agreement, the court will enforce its specific performance so far as practicable.⁴ Thus, where it is agreed that neither shall institute proceedings against the other for restitution of conjugal rights, a suit brought contrary to such agreement will be enjoined.

It follows, from what has been said, that a suit lies in

¹ [Miller v. Miller, 1 N. J. Eq. 386, 391.]

² Jessel, M. R., in *Besant v. Wood*, L. R. 12 Ch. D. 605, 620. See, also, *Clark v. Clark*, L. R. 10 Prob. D. 188; *Fox v. Davis*, 113 Mass. 255.

³ 1 H. L. Cases, 538.

⁴ [So of an agreement as to a division of money and of children, but not so of an agreement to live apart: *Aspinwall v. Aspinwall*, 49

N. J. Eq. 302. An agreement by a wife, who had brought a suit for divorce on the ground of adultery, to condone the offence, and to resume marital relations, is not against public policy, and equity will compel the husband to pay over the consideration named in the agreement: *Barbour v. Barbour*, 49 N. J. Eq. 429; *Adams v. Adams*, 91 N. Y. 381. *Contra*, *Merrill v. Peaslee*, 146 Mass. 460.]

behalf of the husband against the wife to enjoin any breach of the agreement, as well as in her favor against the husband.¹

Suits between Partners.

884. It is beyond my province to consider the subject of partnership in detail. I propose only to point out the instances in which the aid of a court of equity may be appropriate or necessary.

The rule at common law is, that one partner cannot sue another for any matter relating to the partnership. Only one exception exists to this rule: namely, if all the partnership debts are paid and all the partnership accounts closed, and a final balance is ascertained to be due from one partner to the other, a suit at law may be brought to recover this balance. But under no other circumstances will a suit at law lie by one partner against another upon any matter relating to the partnership.²

Owing to this personal disability to sue one another at law, a remedy in equity becomes indispensable.³ There are four leading instances in which it is available:—

885. TO OBTAIN A DISSOLUTION OF THE PARTNERSHIP.—When no period of duration is fixed by the articles of partnership, it is terminable at the pleasure of either party. But when the partnership is for a definite term, and all the members do not agree to a dissolution, it must continue until the end of the term, unless it is sooner dissolved by the death of one of the parties, or by a decree of the court.

Circumstances may arise under which such a decree becomes most just and necessary. There are six possible cases of this kind, as follows:—

(1) Equity will decree a dissolution when one party has

¹ *Clark v. Clark, supra*; *Besant v. Wood, supra*; *Butler v. Butler*, L. R. 16 Q. B. D. 374, *supra*. *Arnold v. Arnold*, 90 N. Y. 580. So, where one member is a partner in two firms, the suit of one firm

² *Gomersall v. Gomersall*, 14 Allen, 60. against the other must be in equity: *Schnebly v. Culter*, 22 Ill. App.

³ [*Holyoke v. Mayo*, 50 Me. 385; 87.]

been led into the partnership by the false representations of the other, so that it becomes inequitable that he should be bound by the partnership agreement.¹

(2) It will decree dissolution on account of the gross and habitual misconduct of one of the partners, constituting a neglect of his duties as a partner, or resulting in or threatening serious injury to the partnership business.²

(3) Equity will decree a dissolution when one of the partners has become insane.³

(4) A dissolution will be decreed, it is said, when the continuance of the partnership becomes impracticable,⁴ as where the object was to carry on a cotton factory, and the buildings were burned down and the partnership had no means with which to rebuild.⁵

(5) Dissolution will be decreed when one of the partners becomes bankrupt or insolvent.⁶

(6) So, also, if one partner is a woman sole, and she marries, this necessarily dissolves the partnership.⁷

Whenever the court decrees dissolution of a partnership, it will also, as a matter of course, decree a final settlement and accounting, and winding up of the partnership affairs. It will require either party to do whatever may be necessary to complete the dissolution, or to give proper notice

¹ *Smith v. Everett*, 126 Mass. 304; [*Oteri v. Scalzo*, 145 U. S. 578; *Rosenstein v. Burns*, 41 Fed. Rep. 841; *Newbigging v. Adam*, L. R. 34 Ch. D. 582; *Tattershall v. Groote*, 2 B. & P. 131.]

² *Parsons on Partnership*, §§ 358, 359, and the cases cited in the notes.

³ *Story on Partnership*, §§ 295-297; *Jones v. Noy*, 2 Myl. & K. 125. [It is otherwise where the insanity promises to be temporary: *Raymond v. Vaughn*, 128 Ill. 256. For a case of habitual drunkenness, see *Howell v. Harvey*, 5 Ark. 270.]

⁴ [As when it becomes impossible to make the business profitable:

Sieghortner v. Weissenborn, 20 N. J. Eq. 172.]

⁵ *Parsons on Partnership*, § 364; *Harrison v. Tennant*, 21 Beav. 482. But see *Clough v. Ratcliffe*, 1 De G. & Sm. 164, where the court refused to wind up an association of Odd Fellows.

⁶ *Story on Partnership*, § 313; [*Arnold v. Brown*, 24 Pick. 89, 93; *Halsey v. Norton*, 45 Miss. 703. A dissolution will also be decreed when dissensions between the partners render it impossible to carry on the business profitably: *Bishop v. Breckles*, Hoffm. Ch. (N. Y.) 534.]

⁷ *Story on Partnership*, § 306.

of it. It will require him, for example, to sign a notice for publication.¹

886. REGULATION OF THE PARTNERSHIP. — Equity will also, during the continuance of the partnership, restrain one partner, at the suit of another, from doing acts in violation of the rights and interests of the partnership.²

Equity cannot compel an unfaithful partner by any affirmative decree to do his duty, but it can restrain him from doing unlawful acts to the prejudice of the partnership. If, for instance, one partner, though forbidden by the partnership articles to sign any checks or notes in behalf of the firm, undertakes to exercise such a right, or if one partner attempts to give a firm note or check for an unlawful purpose, or to misapply the property of the firm for his private debts, a court of equity will restrain him at the suit of his copartners. So, also, if he should attempt to carry on a private trade for his own account in fraud of the partnership he may be restrained in equity.³

887. FINAL SETTLEMENT AND ACCOUNTING. — The third instance of equitable relief is a bill by one partner against the others for an account and settlement of the partnership affairs upon a dissolution of the partnership.⁴ Such a bill may be brought whether the dissolution is by decree of court⁵ or in pursuance of the partnership articles.⁶

If any differences arise, the mode of adjustment and relief is by a bill in equity; and it is under these circumstances that suits between partners are most frequently entertained. The power of the court is complete to require a full and just accounting, to adjudicate all questions arising between

¹ *Hendry v. Turner*, L. R. 32 Ch. D. 355.

² [*Greatrex v. Greatrex*, 1 De G. & Sm. 692; *Charlton v. Coulter*, cited in 19 Ves. 148; *Tillar v. Cook*, 77 Va. 477; *Katz v. Brewington*, 71 Md. 79; *Leavitt v. Windsor Land, &c. Co.* 54 Fed. Rep. 439.]

³ Story on Partnership, §§ 178, 224; [*Levine v. Michel*, 35 La. Ann. 1121.]

⁴ [As a rule, no account will be decreed unless a dissolution is asked for: *Forman v. Homfray*, 2 V. & B. 329; *Pirtle v. Penn*, 3 Dana (Ky.), 247. For a review of the cases, see *Walworth v. Holt*, 4 Myl. & Cr. 619, 635. See, also, *Parsons on Partnership*, § 207.]

⁵ [*Kimble v. Seal*, 92 Ind. 276.]

⁶ [*Freeman v. Freeman*, 136 Mass. 260.]

the partners, to order a proper sale and disposition of the partnership assets, and to decree a proper distribution of the proceeds.¹ To this end, whenever in its opinion the administration of the affairs in settlement cannot safely or properly be left to either of the partners, it may appoint a receiver to hold the property, collect the assets, pay the debts, and make such final distribution among the partners as they are entitled to by law.²

888. CONTRIBUTION BETWEEN PARTNERS. — The fourth and last instance of equitable relief in favor of one partner against another is that of contribution. Whenever one partner, owing to a deficiency of partnership assets or other cause, has been obliged to pay more than his share of the partnership debts, he is entitled to contribution from his copartners. And although there may be partners who are insolvent, or out of the jurisdiction of the court, he will be decreed full contribution against such solvent partners as are within the jurisdiction of the court, without regard to those who are either insolvent or *ex re*.³

Separate Interests.

889. The third instance of jurisdiction on the score of equitable parties is where several persons (more than two) have distinct and separate interests in the same subject-matter.

These several and conflicting interests cannot, from the nature of the case, be determined in any single suit at law. It is an inflexible rule of pleading at common law that in

¹ [Ligare v. Peacock, 109 Ill. 94 ; Lepper, 56 Mich. 351 ; Hefebower Sharp v. Hibbins, 42 N. J. Eq. v. Buch, 64 Md. 15. 543 ; Palmer v. Tyler, 15 Minn. 106.]

² [Clegg v. Fishwick, 1 McN. & G. 294 ; McElvey v. Lewis, 76 N. Y. 373 ; Sutro v. Wagner, 23 N. J. Eq. 388 ; s. c. 24 N. J. Eq. 589 ; Phillips v. Trezevant, 67 N. C. 370. But the court will not appoint a receiver unless the necessity for doing so is clearly shown: Perrin v.

If, after a dissolution, one of the former partners uses the firm name or attempts to carry on the business unlawfully, he may be restrained by injunction. Brass & Iron Works v. Payne, 50 Ohio St. 115 ; Parsons on Partnership, § 212 *et seq.*]

³ Whitcomb v. Converse, 119 Mass. 38 ; Whitman v. Porter, 107 Mass. 522.

all actions *ex contractu*, no persons can be joined, either as plaintiffs or defendants, who have not a joint interest in the subject-matter. However numerous the parties may be, their interest on each side respectively must be identical; it must be a unit. Otherwise they can neither sue nor be sued as one party. For example, if A and B give their joint note to pay the rest of the alphabet \$100, the rest of the alphabet constitute in law but one promisee; the promise is to them jointly as a unit, and therefore they can and must all unite in any suit to recover upon the note. So, also, the promise being joint, the promisors, A and B, constitute in law but one party, and they must both be sued as joint defendants.

But if there is a fund in the hands of A, in which A, B, C, and D claim distinct and independent rights, A cannot join B, C, and D in any suit at law, because their claims are not joint, but several and distinct, and they are as much at variance with one another as they are with the claim of A. Moreover, a judgment in a suit by A against B would leave the matter open as to all the rest.

There is no mode, then, of settling the rights of the parties by one suit except by a suit in equity, which may be brought by either one against all the rest,—and thus their several rights can be tried and settled in a single suit once for all.

It is apparent how important and beneficial this jurisdiction in equity may often become.

It is, as I have had occasion to say, most frequently called into exercise in matters of account, where several parties are interested, but it is by no means confined to accounts.

In *Carr v. Silloway*,¹ where an intestate had indorsed several notes, and, in place of a will, ordered them to be distributed among his children and others, and the validity of all the notes depended upon the same state of facts, a bill was sustained by the administrator against the several holders to determine his liability to pay the notes out of the estate of the deceased.

In Massachusetts this jurisdiction in equity is secured by an express provision.²

¹ 105 Mass. 543.

² Public Statutes, ch. 151, § 1, cl.

Interpleader.

890. Under the preceding head the party bringing the suit claims some right or interest in its subject-matter, and the defendants are claimants adverse to him. But it often happens that a person is innocently in the situation of a mere stake-holder: he owes a debt or holds a certain fund, or other personal property, which he is anxious to pay or hand over to the rightful creditor or owner, but several claimants arise, each asserting that the property is his.

Here, then, is a predicament for which the common law offers no relief to the innocent stake-holder. If he pays to one claimant, he may be sued by and required to pay to the second. And a judgment at law in favor of the second claimant is no defence to him in case he is sued again by the third.¹ Equity, however, furnishes a mode of relief by the bill of interpleader. The stake-holder (as I call him for brevity, meaning the person holding the fund or other property) brings his bill of interpleader, by means of which the several claimants² are obliged to settle their respective claims in that one suit, so that he becomes forever exonerated by disposing of the property according to the final decree of the court in the suit.³

It only remains to state very briefly the requisites of a bill of interpleader.

6, provide for equitable jurisdiction of "cases in which there are more than two parties having distinct rights or interests which cannot be justly and definitely decided and adjusted in one action at the common law."

¹ [Equity Gas Light Co. v. McKeige, 139 N. Y. 237.]

² [The stake-holder need not allege that a suit has been begun against him; it is sufficient if he be threatened with suit: Angell v. Hadden, 15 Ves. 244; Farley v. Blood, 30 N. H. 354. But a mere rumor or suspicion of an adverse

claimant is not sufficient: Blair v. Porter, 13 N. J. Eq. 267; State Ins. Co. v. Gennett, 2 Tenn. Ch. 82.]

³ [McWhirter v. Halsted, 24 Fed. Rep. 828; Wakeman v. Kingsland, 46 N. J. Eq. 113; Crane v. McDonald, 118 N. Y. 648. It is immaterial whether the conflicting claims are legal or equitable: Newhall v. Kastens, 70 Ill. 156. In Massachusetts, a stake-holder, when sued at law, may summon in to defend the suit any claimant adverse to the plaintiff. Acts of 1886, ch. 281. For like statutes in other States, see 3 Pomeroy's Eq. § 1329.]

891. The plaintiff must be a mere stake-holder, *i. e.* he must not himself set up or claim any interest in the subject-matter of the suit. If he does, the suit will fail.¹

The position of the plaintiff must be that of complete neutrality; he must make no claim himself, and must stand indifferent as to the respective claimants.²

The claims of the several defendants must be for the same debt, duty, or thing.³

What constitutes this identity? When is it considered the same debt, duty, or thing? A few examples must answer the question. A, a debtor, owes B a debt, and some creditors of B assert that he has assigned it to them, and they notify A to pay it accordingly. Here the one thing claimed is the debt of A to B, and they all claim it through B, each creditor or set of creditors setting up an assignment from B. It is therefore a clear case of interpleader in behalf of A against B and the respective creditors.⁴

So where each of two persons contended that he was the legatee intended in a certain will, and the designation in the will was obscure, it was held that a bill of interpleader by the executor would lie. In this case each person claimed the same legacy.⁵

¹ Langston v. Boylston, 2 Ves. Jr. 101, 109; Story's Eq. Pl. § 297; Crawshay v. Thornton, 2 Myl. & Cr. 1; [Cogswell v. Armstrong, 77 Ill. 139; Williams v. Matthews, 47 N. J. Eq. 196. An executor who is also residuary legatee cannot bring a bill of interpleader, but he may bring a bill for instructions: Ladd v. Chase, 155 Mass. 417. Interpleader cannot be maintained if there is a controversy as to the stake-holder's obligation to pay interest on the funds held by him: Bridesburg Manuf. Co.'s Appeal, 106 Pa. St. 275.]

² Killian v. Ebbinghaus, 110 U. S. 568.

³ [Dodd v. Bellows, 29 N. J. Eq. 127. A bill of interpleader will lie

against the tax-collectors of two different towns, each of whom asserts the right to tax the plaintiff's property: 2 Story's Eq. 813 *a*. But this is not so if the tax assessed in one town is greater than that assessed in the other: Greene v. Mumford, 4 R. I. 313. In Massachusetts this equitable jurisdiction is held to be ousted by a statute authorizing a suit at law to recover taxes illegally collected: Macy v. Nantucket, 121 Mass. 351.]

⁴ [It is immaterial whether the whole or only a part of the claim has been assigned: School District v. Weston, 31 Mich. 85.]

⁵ Morse v. Stearns, 131 Mass. 389; Bodman v. American Tract Society, 9 Allen, 447.

In *Spring v. South Carolina Insurance Co.*¹ a bill was maintained by an insurance company against various creditors of the insured who claimed the insurance money under different assignments.² Whenever the several claimants derive their titles from one and the same source, the necessary identity exists.³

892. Taking now a different case, let us suppose that the debt of A to B arose from a purchase of personal property. C claims that it was his property and not B's, and therefore he calls upon A to pay him. This, unfortunately, is not a case for interpleader. A debt due to or claimed by B is not the same as a debt due to or claimed by C, although the debt arises in each case from a sale of one and the same article claimed by both.⁴

The debt must be claimed by virtue of some privity existing between the claimants, such as the privity between assignor and assignee; or else the claimants must all derive title from the same creditor or original owner of the fund, and not as strangers under adverse titles.⁵

Where personal property in the hands of a third party lawfully in possession, but asserting no title to it, is claimed by several persons under one common owner, it is a case for interpleader.⁶

893. But where several persons claim the same property under independent titles not derived from the same source, a bill of interpleader will not lie in behalf of the innocent holder. He must act at his own risk.⁷

¹ 8 Wheat. 268.

² [Nelson v. Barter, 2 Hem. & M. 334. So a corporation may maintain interpleader to determine which of two claimants is entitled to certain shares of its stock: Salisbury Mills v. Townsend, 109 Mass. 115.]

³ [Pearson v. Cardon, 2 Russ. & M. 606; Crosby v. Mason, 32 Conn. 482.]

⁴ [James v. Pritchard, 7 Mee. & W. 216.]

⁵ Third National Bank v. Skil-

lings, &c. Lumber Co. 132 Mass. 410.

⁶ Cobb v. Rice, 130 Mass. 231. In this case certain personal property, lawfully in the custody of the plaintiff, originally belonged to one Winslow, and was claimed by his wife, his sister-in-law, and his assignee in bankruptcy.

⁷ 2 Story's Eq. § 816; contra, § 806 in the same volume; [First National Bank of Morristown v. Bininger, 26 N. J. Eq. 345; Marvin v. Ellwood, 11 Paige, 365.]

So where a sheriff has seized goods as being those of A, and B claims them as his, no interpleader will lie on behalf of the sheriff.¹ But if, instead of B a stranger, the claimant had been the assignee in bankruptcy of A, then a bill of interpleader might have been brought by the sheriff.²

It follows, also, that the bailee of personal property, a warehouseman for example, cannot bring a bill of interpleader on the ground that a third person, not claiming under the depositor but adversely to him, asserts a title to the property.³

894. If, however, it is alleged that the depositor himself has created a lien on the property in favor of the third party who claims it, or has transferred to him any other interest in it, then a case arises for a bill of interpleader, because the two adverse claims to the property are both derived from and asserted under the same source, namely, the original depositor.⁴

So, also, with regard to rent. If a stranger to the landlord claims the premises by a distinct and adverse title, and calls upon the tenant to pay rent to him, the tenant cannot maintain a bill of interpleader, both because he cannot deny the title of his landlord, and also because the claim of the stranger is not made under the landlord but adversely to him.⁵ If, however, the rent is claimed by an assignee of the landlord, the landlord denying the assignment, then a case for interpleader exists, because the thing demanded by each is the rent, and the assignee claims, not as a stranger, but as being in privity with the landlord, and as deriving title from him.⁶

895. But when a person has himself created several con-

¹ [Shaw v. Coster, 8 Paige, 339; 281; Smith v. Hammond, 6 Sim. Parker v. Barker, 42 N. H. 78.] 10.]

² Child v. Mann, L. R. 3 Eq. 806; Fairbanks v. Belknap, 135 47.]
Mass. 179, 185.

³ Bartlett v. Sultan of Turkey, 23 Blatch. 196.

⁴ Crawford v. Fisher, 1 Hare, 436; [Gibson v. Goldthwait, 7 Ala. 270.]

⁵ [McKolson v. Knowles, 5 Mad. 47.]
⁶ 2 Story's Eq. § 812; Crawshaw v. Thornton, 2 Myl. & Cr. 1, 21; [Ketcham v. Brazil Coal Co. 88 Ind. 515; Badeau v. Tylee, 1 Sandf. Ch. 270.]

fictitious claims against himself, he cannot compel the claimants to interplead.¹

Thus, if a landlord has assigned his claim for rent to A, and made another assignment of it to B, he cannot make A and B interplead to determine which shall be paid. He may be obliged to pay both. It is only in behalf of a perfectly innocent and disinterested stake-holder that interpleader will lie. So, again, where an insurance company issued a policy on the life of A, payable to B, and then allowed A, without B's consent, to surrender the policy, and issued another payable to C, it was held that the company could not bring interpleader against B and C to determine which one it should pay. It might be that the company was liable to both.²

896. The rules upon this subject may be summarized as follows : —

(1) Where there are several claimants of a debt, and all claim under the original creditor, a bill of interpleader will lie on behalf of the debtor against the several claimants to determine which one shall be paid.

(2) So, where there are several claimants to a fund in the hands of a depositary, but all set up the same source of title, — as, for example, where all claim under different assignments from the original owner of the fund, — a bill will lie in favor of the depositary against these several claimants to determine which one is entitled to the fund.

(3) Where any personal property in the hands of a mere custodian is claimed by several persons, and they all derive their title from one and the same source, a bill of interpleader will lie. And this is true although the contestants are the original owner himself, and others who claim under some alleged lien or assignment made by him.

(4) Whenever to any debt, fund, or property several claims not derived from one and the same original source, but wholly distinct and independent in their origin, are made, no bill of interpleader will lie, and the debtor or custodian must act at his peril.

¹ [Cochrane v. O'Brien, 2 Jo. & Lat. (Ir.) 380; Conley v. Alabama Gold Life Ins. Co. 67 Ala. 472.] ² National Life Insurance Co. v. Pingrey, 141 Mass. 411.

897. If the case proves to be a proper one for interpleader, a decree follows that the persons named as defendants in the bill shall interplead, and the case thereafter proceeds between them as the sole parties to the controversy. The original plaintiff has no further interest in it. He has therefore no occasion and no right to be heard upon the merits of the question as between the claimants.¹

When the court determines to which of the respective claimants the fund or property belongs, a decree to that effect is made, which also directs the original plaintiff to pay over or deliver it accordingly.

Multiplicity of Suits.

898. Another ground of equitable jurisdiction, closely related to the subject of interpleader, is the prevention of a multiplicity of suits. There are, indeed, some cases over which equity takes jurisdiction on account of the very nature of the subject-matter, irrespective of the consideration that thereby a multiplicity of suits is also prevented. But there are other cases where the sole reason for the equitable jurisdiction is to avoid the necessity of bringing many suits at law; and these cases (some of which I have mentioned incidentally in previous lectures) may be classified as follows: —

BILLS FOR DISCOVERY AND RELIEF. — Where the subject-matter is primarily one over which equity would not take jurisdiction, yet if a bill has properly been brought for discovery, and discovery has been obtained, a court of chancery will ordinarily retain the bill, and give the plaintiff appropriate relief, instead of compelling him to bring another suit at law, although the relief which it gives is precisely the same as that which would be obtained in a court of law. This rule has no application to bills of discovery which are brought simply in aid of existing suits at law.

Now the only reason for giving any relief upon such a bill beyond the discovery is the equitable reason of preventing a multiplicity of suits. Having the case properly before it,

¹ *Houghton v. Kendall*, 7 Allen, solicitor is not permitted to act as
 72. In Massachusetts the plaintiff's solicitor for either of the claimants.

so far as the discovery is concerned, equity will also proceed to hear and determine the case upon its merits, if the whole case is before the court, in order to obviate the necessity of another suit and trial at law.¹

But this is a matter very much within the discretionary power of courts of chancery, and they exercise or decline the jurisdiction mainly according to the nature of each particular case.

899. The rule also applies to several persons — not being co-sureties — who are bound to contribute to the discharge of some lien or incumbrance. Such a case arises when the owner of a tract of land mortgages it, and then conveys it in separate lots to several grantees. Each grantee is bound to contribute his ratable proportion to the discharge of the incumbrance, according to the value which his lot bears to the whole; and the grantee who has paid the whole is entitled to recover his due proportion from each of the others. To prevent the necessity of a suit at law against each, he may bring one bill in equity against all.²

900. A bill for contribution among sureties is maintainable in part upon this same ground,³ as is also a bill by or against several persons who have distinct and separate interests in the same subject-matter. But this is not the exclusive ground for the maintenance of the bill in either case.

901. The fourth instance is the case of general average, as it is called. According to the maritime law, which is universally recognized, whenever upon a sea voyage a loss has been sustained by one for the common benefit of all who have anything at risk, all are bound to contribute their due proportion to make up this loss.

Thus if, to save a ship from impending peril, a part of the cargo is thrown overboard, the owner of the goods thus sacrificed is not obliged to bear the whole loss, but the owners of the ship and of the rest of the cargo are bound to contribute their share, according to the proportional value of

¹ 1 Story's Eq. 71; Russell v. Clark, 7 Cranch, 69, 89; Wallis v. Shelly, 30 Fed. Rep. 747.

² 1 Story's Eq. 484.

³ [Walker v. Cheever, 35 N. H. 339.]

each interest. This contribution is known in the maritime law as "general average."

If in such a case the sufferer was obliged to bring a suit at law against each of the other shippers and shipowners, amounting perhaps to a hundred persons, for their proportion of the loss, his remedy, it is plain, would be burdensome and difficult, and often hopeless. In order to avoid this multiplicity of suits and the injustice which it would entail, equity takes jurisdiction in all cases of general average.¹

902. Generally speaking, a court of equity will take jurisdiction whenever all parties to the suit are interested in its subject-matter, and the decree of that court will conclusively settle the matter, which otherwise could not be settled except by several suits at law.²

Thus, where a tax was laid upon various lots of land of which some had been sold, and some were in process of selling, a bill to prevent the collection of the tax on the ground that it was illegal, and that a multiplicity of suits at law would thus be prevented, was maintained.³

Equitable Defences.

903. There are three defences peculiar to a court of equity which I shall now briefly consider, namely; (1) The defendant a *bond fide* purchaser for value. (2) Laches of the complainant; (3) Equitable estoppel.

I have had occasion already to refer to the first defence, namely, that the defendant is a purchaser in good faith for value, and without notice of any adverse claim, but its leading points remain to be stated. The rule is made for the

¹ 1 Story's Eq. §§ 490, 491.

² [Tenham v. Herbert, 2 Atk. 483; Western Land, &c. Co. v. Guinault, 37 Fed. Rep. 523; Chase v. Cannon, 47 Fed. Rep. 674; Farmington Village v. Sandy River Bank, 85 Me. 46; Haynes v. Union Investment Co. 35 Neb. 766; Preteca v. Maxwell Land Co. 50 Fed. Rep. 674; 1 Pomerooy's Eq. § 243 *et seq.* See, also, *supra*, p. 24. When several suits at law are pending, all based upon

the same facts, equity will enjoin the others until the point at issue can be determined in one. McConaughy v. Pennoyer, 43 Fed. Rep. 339; Third Ave. R. R. Co. v. Mayor of New York, 54 N. Y. 159.]

³ Union Pacific Railway Co. v. Cheyenne, 113 U. S. 516, 525. See, also, Plummer v. Connecticut Mutual Life Insurance Co. 1 Holmes, 267; Carr v. Silloway, 105 Mass. 543.

protection of one holding the legal title against any outstanding equitable claim.

Chief Justice Marshall said : "The rules respecting a purchaser without notice are framed for the protection of him who purchases a legal estate and pays the purchase-money without knowledge of an outstanding equity. . . . They apply only to the purchaser of the legal estate."¹ The rule has place, therefore, only when the conflict is between an asserted equitable claim on the one side and the legal title on the other. As between two strictly legal titles, the better title always prevails, this being the rule in equity as well as at law.

904. Who is a purchaser for value,² *i. e.* for a valuable consideration ? A preëxisting debt in payment of which the transfer is made constitutes a valuable consideration, as well as money actually advanced or paid at the time.³ This is true of negotiable notes and bills of exchange taken in payment of a preëxisting debt as well as of other property purchased. The rule also applies to negotiable paper which is taken merely as security for a preëxisting debt.⁴

But this rule as to security is confined to negotiable paper. If other property, real or personal, is conveyed merely as security for an existing debt, that is not a purchase for value within the rule, and will not defeat any prior equity.

¹ *Vattier v. Hinde*, 7 Peters, 252, 271.

² [Not an execution creditor buying at his own sale : *Old National Bank v. Findley*, 131 Ind. 225. Nor one who pays only a nominal consideration : *Proctor v. Cole*, 104 Ind. 373.]

³ [*Harold v. Kays*, 64 Mich. 439; *State Bank v. Frame*, 112 Nev. 502. *Contra*, *Eaton v. Davidson*, 46 Ohio St. 355; *Mingus v. Condit*, 23 N. J. Eq. 313; *Sipley v. Wass*, 49 N. J. Eq. 463, 471; *Schulein v. Haines*, 48 Kan. 249.]

⁴ *Swift v. Tyson*, 16 Peters, 1; *Ives v. The Farmers' Bank*, 2 Allen, 236; *Railroad Co. v. National Bank*, 102 U. S. 14; *Oates v. National*

Bank, 100 U. S. 239; [*Deere v. Marsden*, 88 Mo. 512; *Spencer v. Sloan*, 108 Ind. 183. *Contra*, *Liggett Spring, &c. Co.'s Appeal*, 111 Pa. St. 291; *Smith v. Bibber*, 82 Me. 34; *Webster v. Howe Machine Co.* 54 Conn. 394, where the question was as to the law of New York, and not of Connecticut.]

In New York it is held that one who takes negotiable paper as security for a preëxisting debt is not a purchaser for value : *Dickerson v. Tillinghast*, 4 Paige, 215, 222. But if, upon taking the new security, he relinquishes a prior valid security, he is a purchaser for value : *Padgett v. Lawrence*, 10 Paige, 170, 180; *Youngs v. Lee*, 12 N. Y. 551.

"It is well settled that the conveyance of lands or chattels as security for an antecedent debt will not operate as a purchase for value, or defeat existing equities."¹

905. The consideration must have been paid before the purchaser received notice of the outstanding equitable claim. Although, when the conveyance was made, the purchaser had no notice, yet, if before he pays the consideration he receives notice, he is then chargeable with notice, and if he pays thereafter he will not be protected.²

906. WHAT IS NOTICE. — Whatever is sufficient to put a purchaser upon inquiry is in equity equivalent to notice of whatever such inquiry would disclose.³

A purchaser must act in good faith, and with the vigilance which men ordinarily exercise under similar circumstances. He is not bound to listen to vague rumors,⁴ but information coming from authentic sources he is bound to heed and investigate.⁵

¹ *People's Savings Bank v. Bates*, 120 U. S. 556, 567; [*Ashton's Appeal*, 73 Pa. St. 153; *Boxheimer v. Gunn*, 24 Mich. 372; *Milton v. Boyd*, 49 N. J. Eq. 142; *First National Bank v. Conn. Mut. Life Ins. Co.* 129 Ind. 241.]

² *De Mott v. Starkey*, 3 Barb. Chan. (N. Y.) 403; *Wormley v. Wormley*, 8 Wheat. 421; [*Green v. Green*, 41 Kan. 472; *Smith v. Schweigerer*, 129 Ind. 363; *Greenlee v. Marquis*, 49 Mo. App. 290. The vendee who has notice will not be protected even though he has given security for the purchase-money: *Tourville v. Naish*, 3 P. Wms. 307; *Wood v. Rayburn*, 18 Oregon, 3; *Losey v. Simpson*, 11 N. J. Eq. 246.]

³ It was said in *Pingree v. Coffin*, 12 Gray, 288, 307: "They [the defendants] had what was sufficient to put them upon inquiry, and that was good notice."

⁴ *Satterfield v. Malone*, 35 Fed.

Rep. 445; *Bugbee's Appeal*, 110 Pa. St. 331.

⁵ *Flagg v. Mann*, 14 Pick. 467; *Jenkins v. Eldredge*, 3 Story's Rep. 181, 297; *Connihan v. Thompson*, 111 Mass. 270; *National Provincial Bank of England v. Jackson*, L. R. 33 Ch. D. 1; *Briggs v. Rice*, 130 Mass. 50 (in this case the notice was held to be not sufficient); [*Dugger v. Dugger*, 84 Va. 130; *Knapp v. Bailey*, 79 Me. 195; *Drey v. Doyle*, 99 Mo. 459; *Ellis v. Horrmann*, 90 N. Y. 466. If a person has possession of land, that is notice of his right to possession: *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 442; *Hattenstein v. Lerch*, 104 Pa. St. 454; *Thomas v. Burnett*, 128 Ill. 37; *Phelan v. Brady*, 119 N. Y. 587; *Van Gunden v. Virginia Coal Co.* 52 Fed. Rep. 838. So, where one purchases land upon which a railroad track is laid, he has notice of the railroad company's interest in the land: *Paul v. Con-*

907. If a *bond fide* purchaser conveys to one who had notice of the prior equity, the latter, notwithstanding the notice, takes a good title, because he takes the title of the *bond fide* purchaser.¹

This rule is necessary, it is said, for the protection of the honest purchaser, for otherwise he would seriously be hampered in the disposal of his property.

But if a trustee sells to an innocent purchaser, and himself becomes a subsequent purchaser, the estate upon his repurchase is chargeable with the trust in his hands, and he cannot defend under the title of his grantor.²

versville R. R. Co. 51 Ind. 527. Where one purchases bonds knowing that a suit in relation to them is pending, he is put upon inquiry: *Lytle v. Lansing*, 147 U. S. 59. The vendee's knowledge that his vendor purchased the land in question for an extremely inadequate price is notice: *Dunn v. Barnum*, 51 Fed. Rep. 355; *Hume v. Franzen*, 73 Iowa, 25. It has been held that receiving a quitclaim deed is sufficient to put the grantee upon inquiry: *Goddard v. Donaha*, 42 Kan. 754; *Bowman v. Griffith*, 35 Neb. 361. But the law is now otherwise. See *Moelle v. Sherwood*, 148 U. S. 21; *White v. McGarry*, 47 Fed. Rep. 420. See, also, *supra*, p. 158. Where there is a provision for recording contracts to purchase, and deeds of land, such recording is of course constructive notice to all the world. But if the deed is one not proper to be recorded, or if it is defective, actual notice must be shown: *Pringle v. Dunn*, 37 Wis. 449; *Bradley v. Walker*, 138 N. Y. 291; 1 Story's Eq. § 404; 2 Pomeroi's Eq. § 644 *et seq.* But in *Beardsley v. Day*, 52 Minn. 451, it was held that the recording of a deed, defective for want of a seal, was notice.

As to what is notice: *Brighton v. Doyle*, 64 Vt. 616; *Overall v. Taylor*, 99 Ala. 12; *Phillips v. Hodges*, 109 U. S. 248; *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 437. Cases where the court held the notice to be insufficient: *Hetzel v. Barber*, 69 N. Y. 1; *Acer v. Westcott*, 46 N. Y. 384. The present tendency of the courts is to restrict the doctrine of notice, and to make good faith, rather than due care, the criterion: *Parker v. Conner*, 93 N. Y. 118; *Woodworth v. Paige*, 5 Ohio St. 70; *Kettlewell v. Watson*, L. R. 21 Ch. D. 685. Especially is this so in the case of negotiable paper: *Bank of Republic v. Young*, 41 N. J. Eq. 531; *Kitchen v. Londenback*, 48 Ohio St. 177; *Venables v. Baring Brothers* [1892], 2 Ch. 527.]

¹ *Montclair v. Ramsdell*, 107 U. S. 147; *Douglas County v. Bolles*, 94 U. S. 104; [*Rutgers v. Kingsland*, 7 N. J. Eq. 178; *Old Bank of Evansville v. Findley*, 131 Ind. 225. But if both the original and the subsequent purchaser have notice, the latter, as well as the former, will be estopped: *Raritan Power Co. v. Vegelite*, 21 N. J. Eq. 463.]

² *Hill on Trustees*, p. 165; *Bovey v. Smith*, 1 Vern. 144; *Church v.*

Laches.

908. Laches is unreasonable delay of a complainant in bringing suit. It is true, as we have seen, that a court of equity, both in cases of concurrent and exclusive jurisdiction, will not ordinarily entertain a bill brought after the lapse of a period greater than that prescribed by the statutes of limitation for actions at law in corresponding cases; but it is also true that courts of equity will sometimes hold the claim barred by the lapse of a much less time than that prescribed by these statutes. Whenever there has been great and unnecessary delay in the presentation of a claim, so that its assertion has become inequitable, a court of equity, regardless of statutory limitations, will refuse to entertain it.¹

It has repeatedly been said, by courts of the highest authority, that "there is a defence peculiar to courts of equity, founded on lapse of time and the staleness of the claim, where no statute of limitations governs the case. In such cases, courts of equity acting upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, refuse to interfere where there has been gross laches in prosecuting the claim or long acquiescence in the assertion of adverse rights."²

From the nature of the case, no rigid rule can be laid down as to what delay will constitute laches; every suit must depend upon its own circumstances. But whenever the delay fairly justifies the inference of acquiescence in the adverse claim,³ or whenever it has been of such a character as to

Ruland, 64 Pa. St. 432, 444; Kennedy v. Daly, 1 Sch. & Lef. 355, 379; Oliver v. Piatt, 3 How. 333, 401; Barrows's Case, L. R. 14 Ch. D. 432, 445. [See, also, Trentman v. Eldridge, 98 Ind. 525; Attorney-General v. Abbott, 154 Mass. 323.]

¹ [Van Vleet v. Sledge, 45 Fed. Rep. 743; Foster v. Mansfield, &c. R. R. 146 U. S. 88.]

² Badger v. Badger, 2 Wall. 87,

94; Sullivan v. Portland, &c. R. Co. 94 U. S. 806; Harwood v. Railroad Co. 17 Wall. 78.

³ [Calhoun v. Millard, 121 N. Y. 69; Irish v. Antioch College, 126 Ill. 474; Underwood v. Dugan, 139 U. S. 380; Ware v. Galveston, 146 U. S. 102; Harrison v. Gibson, 23 Gratt. 212. See, also, *supra*, p. 78, note. In Koons v. Blanton, 129 Ind. 883, a conveyance was set aside nine years after it was made.]

induce other persons to alter their circumstances or conduct, so that the element of estoppel is introduced,¹ a court of equity will commonly hold the delay to operate as an absolute bar.²

909. This doctrine of laches applies only to equitable claims, not to legal titles or rights; as to them, courts of equity follow the statutes of limitation.³

Again, in all cases where the transaction, of which complaint is made and concealment is alleged, is an old one, reasonable diligence will be required of the plaintiff in asserting his right after he obtained knowledge of it. Delay then becomes suspicious, for, with the lapse of time, ability to prove the true character of any transaction diminishes; and therefore delay under such circumstances soon ripens into conclusive evidence of acquiescence.⁴

Equitable Estoppel.

910. Equitable estoppel consists in this: Whenever, by his conduct or declarations, one has induced another to act upon the belief in certain facts, he shall not thereafter deny the truth of such facts to the prejudice of the other.

The reason upon which this rule is based is that, where one party has induced another to act⁵ upon a representation, it operates as a fraud upon the one whom he has misled,

¹ [Snow v. Boston Blank Book Co. 158 Mass. 325; State v. Flint, &c. R. R. Co. 89 Mich. 481; Henry v. Suttle, 42 Fed. Rep. 91. The fact that the property has increased in value is material: Johnston v. Standard Mining Co. 148 U. S. 360; Allen v. Allen, 47 Mich. 74, 79. And so is the fact that one of the parties to the transaction is dead: Hatcher v. Hall, 77 Va. 573.]

² Hayward v. National Bank, 96 U. S. 611, 617; Twin-Lick Oil Co. v. Marbury, 91 U. S. 587 (nearly four years in each case); Boston & Maine R. R. v. Bartlett, 10 Gray, 384; Fraker v. Houck, 36 Fed. Rep.

403; Wright v. Vanderplank, 8 De G., M. & G. 133; Turner v. Collins, L. R. 7 Ch. App. 329.

³ *In re Maddever*, L. R. 27 Ch. D. 523, 531; [Morris v. McClary, 43 Minn. 346.]

⁴ Badger v. Badger, 2 Wall. 87, *supra*; Evans v. Bacon, 99 Mass. 213. See, also, Harwood v. Railroad Co. 17 Wall. 78, where the question arose upon a bill to set aside judicial proceedings.

⁵ [Or to refrain from acting; as to refrain from bringing a suit: Davis v. Dwyer, 56 N. H. 143. See, also, Allen v. Goodnow, 71 Me. 420.]

should he be permitted thereafter to deny the truth of his representation.¹

It is a necessary element, then, in all estoppels of this character, either (1) that the party intended to mislead and deceive the other, or (2) that the natural consequence² of his conduct was to mislead, and therefore he was guilty of such gross negligence as is equivalent to constructive fraud. There must be either a fraudulent intent or else gross negligence which operates as a fraud³ upon the innocent party.⁴

¹ [Hill v. Epley, 81 Pa. St. 331. But the plaintiff is not estopped unless the defendant relied upon the statements or conduct in question: Earl v. Stevens, 57 Vt. 474; Powell v. Rogers, 105 Ill. 318; Welsh v. Taylor, 134 N. Y. 450, 457. Thus, there can be no estoppel if the defendant acted before the representations which he sets up were made: Behrens v. Germania Insurance Co. 64 Iowa, 19; Archer v. Maryland, 74 Md. 443. Or if he knew that the representations were untrue: Eliot v. Eliot, 81 Wis. 295; Buck v. Milford, 90 Ind. 291; Robbins v. Potter, 98 Mass. 532.]

² [Blair v. Wait, 69 N. Y. 113.]

³ [The authorities upon this point are cited in Ruckelhaus v. Oehme, 48 N. J. Eq. 436, 449. See also Galbraith v. Lunsford, 87 Tenn. 89.]

⁴ [Shipley v. Fox, 69 Md. 572, 579; Brant v. Virginia Coal & Co. 93 U. S. 326; Griffith v. Brown, 76 Cal. 260. But there is no estoppel unless some real damage to the defendant has resulted, or would result except for the estoppel: Adler v. Pin, 80 Ala. 351; Guest v. Burlington Opera House, 74 Iowa, 457; Townsend Savings Bank v. Todd, 47 Conn. 190; Warder v. Baker, 54 Wis. 49; McClure v. Livermore,

78 Me. 390; Jamison v. Miller, 64 Iowa, 402. Thus, the breach of a mere executory promise does not constitute an estoppel: Clanton v. Scrnggs, 95 Ala. 279. An interesting case is that of Tyler v. Odd Fellows, 145 Mass. 134, where the court held that the plaintiff was not estopped from claiming \$1500 from the defendant by the fact that his guardian, acting under a mistake, had acquiesced in the payment of this sum to another, and had signed a receipt in full. See, also, Dolarque v. Cress, 71 Ill. 380; Dean v. Driggs, 137 N. Y. 274. A mere bystander is not an "innocent party" in this sense: Morgan v. Spangler, 14 Ohio St. 102. Nor is the assignee of the person misled: The John Shillito Co. v. McClung, 51 Fed. Rep. 868. But a statement made to a commercial agency will operate as an estoppel in favor of the customers of the agency: Irish-American Bank v. Ludlum, 49 Minn. 344. Estoppel cannot, ordinarily, be pleaded to a suit by the United States government: Carr v. United States, 98 U. S. 433. But see United States v. Willamette, & Co. 54 Fed. Rep. 807. Nor is laches a defence to a suit brought by a city for removal of a public nuisance: Webb v. City of Demopolis, 95 Ala. 116. The doctrine of laches cannot

Equitable estoppels are sometimes called estoppels *in pais*, because they are created entirely by the conduct or declarations of the party, in distinction from estoppels created by records, deeds, or other written instruments. And they are called equitable estoppels because formerly they were recognized and enforced only in equity. But in many cases they are now equally recognized and enforced in suits at law.¹

These estoppels may be created by the acts of a party,² by his express declaration, and in many cases by his silence, — by his not speaking when he had a duty to speak. “If a man was silent when he ought to have spoken, he shall not speak when he ought to be silent.”³

911. There are three leading instances in which the doctrine of equitable estoppel applies. (a) Where a party has assumed to act in a certain capacity, he is estopped to deny such capacity as against those with whom he has thus dealt.⁴

For example, where a corporation assumed to act as such, it was estopped to deny the validity of its organization.⁵

be invoked in aid of a fraudulent purpose: *Royce v. Watrous*, 73 N. Y. 597.]

¹ [*Horn v. Cole*, 51 N. H. 287; *The John Shillito Co. v. McClung*, 45 Fed. Rep. 778. For this same reason, if an equitable estoppel is available as a defence in a suit at law, the defendant cannot, by a suit in equity, restrain the plaintiff from bringing the suit at law: *Barnard v. German-American Seminary*, 49 Mich. 444; *Vermont Copper Mining Co. v. Ormsby*, 47 Vt. 709. As to when resort may be had to equity in cases of equitable estoppel, see *Drexel v. Berney*, 122 U. S. 241.]

² [*Matter of Cooper*, 93 N. Y. 507; *Bidwell v. Pittsburgh*, 85 Pa. St. 412. One who has availed himself of an unconstitutional law is estopped to set up its unconstitutionality: *Daniels v. Tearney*, 102 U. S. 415. See, also, for kindred cases: *Robertson v. Smith*, 129 Ind.

422; *State v. Mitchell*, 31 Ohio St. 592.]

³ [*Anderson v. Hubble*, 93 Ind. 570 (an extreme case); *Hervey v. Illinois Midland Ry.* 28 Fed. Rep. 169; *Woods v. Wilson*, 37 Pa. St. 379; *Chapman v. Chapman*, 59 Pa. St. 214. But silence will not estop unless there is a duty to speak: *New York Rubber Co. v. Rothery*, 107 N. Y. 310; *Chandler v. White*, 84 Ill. 435; *Sullivan v. Davis*, 29 Kan. 28; *Wagner's Appeal*, 98 Pa. St. 77; *Kingman v. Graham*, 51 Wis. 232; *Collier v. Miller*, 137 N. Y. 332; *Schilling v. Black*, 49 Kan. 552.]

⁴ [*State v. Stone*, 40 Iowa, 547; *Strecker v. Conn*, 90 Ind. 469; *McBridge v. McIntire*, 91 Mich. 406. So, a tax collector cannot dispute the regularity of the steps taken by him to collect the tax: *Purcell v. Town of Bear Creek*, 138 Ill. 524.]

⁵ *Dooley v. Cheshire Glass Co.* 15 Gray. 494.

So, on the other hand, one contracting with a corporation is ordinarily estopped to deny its existence.¹ Again, a person holding himself out and inducing others to deal with him as agent of B is estopped to deny the agency.

(b) One who claims to derive or hold any interest under a deed, will, or other instrument, is estopped to deny the validity of such instrument for any other purpose.²

912. (c) Where one by his conduct or representations has induced another to acquire an interest in a particular property, he is estopped to assert any adverse title thereto.³

Cases of this kind have furnished occasion for the most important and most frequent applications of the doctrine of equitable estoppel. It is well settled that whenever one person induces another to invest in property, either by way of purchase or mortgage, by actual representations that he has no adverse title thereto, or by conduct which under the circumstances is equivalent to such representations, he will not be allowed to set up any claim to the property to the injury of such purchaser or mortgagee.

Thus, where A, a joint heir with B his sister, wrote to B that she might have all the estate and might sell it, and B thereupon sold it, it was held that A and his grantee were estopped by the letter from setting up any claim to the estate as against B's grantee.⁴

Where a mortgagee falsely represented to an attaching creditor of the mortgagor that his mortgage debt was paid, and thus induced the creditor to release the attachment and to take a mortgage which was in fact a second mortgage,

¹ *Citizens' Mutual Fire Insurance Co. v. Sortwell*, 8 Allen, 217. [Otherwise of one subscribing to stock of a projected corporation. *Rikhoff v. Brown's Rotary Shuttle Co.* 68 Ind. 388.]

² *Watson v. Watson*, 128 Mass. 152; *Dooley v. Wolcott*, 4 Allen, 406; [*Board v. Board*, L. R. 9 Q. B. 48; *Hatch v. Bullock*, 57 N. H. 15; *Turpin v. Dennis*, 139 Ill. 274; *Farwell v. Cohen*, 138 Ill. 216, 239;

Burke v. Turner, 90 N. C. 588; *Pringle v. Dunn*, 37 Wis. 449.]

³ [*Trustees of Brookhaven v. Smith*, 118 N. Y. 634; *Tracy v. Lincoln*, 145 Mass. 357; *Taylor v. Hearn*, 131 Ind. 537; *Chapman v. Pingree*, 67 Me. 198; *Mayo v. Leggett*, 96 N. C. 237; *Burton's Appeal*, 93 Pa. St. 214; *Chapman v. Chapman*, 59 Pa. St. 214. *Hill v. Wand*, 47 Kan. 340.]

⁴ *Dickerson v. Colgrove*, 100 U. S. 578.

it was held that his mortgage should be postponed to that of the second mortgagee, although it was recorded.¹

So, where one having a mechanics' lien upon an estate represented at the auction of it that there was no incumbrance upon the property, and advised the plaintiff to buy it, he was held estopped to assert his lien.²

Where a mortgagor had induced the plaintiff to buy the mortgage, and to make improvements on the estate, by representing that the estate was not worth more than the debt, and that he should not redeem, he was held estopped to redeem.³

913. So, where the defendants purchased an estate not knowing that the plaintiff had any claim to it as mortgagor, and he approved of their purchase and advised them to make large improvements on the property, which they did, he was estopped to set up against them a title as mortgagor and a right to redeem.⁴

Where the mortgage failed to state the rate of interest, but the note accompanying the mortgage put the interest at five per cent. per month after maturity, and the mortgagee led attaching creditors who bought the equity of redemption to believe that the note was at the ordinary rate of interest, and thus misled them to tender the wrong amount, he was held estopped to claim more than six per cent. interest on the note after it became payable.⁵

But where the owner of land erroneously, under a mistake of fact, supposed that the line between him and his neighbor was correctly laid down in a certain plan, and so assented to his neighbor's building according to that plan, it was held that he was not estopped from asserting that the building was an encroachment.⁶

914. Although not strictly an equitable estoppel, estoppel

¹ *Platt v. Squire*, 12 Met. 494.

² *Hinchley v. Greany*, 118 Mass. 595.

³ *Fay v. Valentine*, 12 Pick. 40.

⁴ *Tufts v. Tapley*, 129 Mass. 380. See, also, *Kirk v. Hamilton*, 102 U. S. 68.

⁵ *May v. Gates*, 137 Mass. 389.

⁶ *Proctor v. Putnam Machine Co.* 137 Mass. 159; [*Henshaw v. Bissell*, 18 Wall. 255; *White v. Ward*, 35 W. Va. 418; *Evans v. Miller*, 58 Miss. 120. But see *Galbraith v. Lunsford*, 87 Tenn. 89; *Storrs v. Barker*, 6 Johns. Ch. 166.]

by recital in a bond or other obligation has been enforced very strictly in modern cases.¹

Bona fide holders of bonds have a right to assume that the necessary preliminary proceedings have been taken, if it is so recited in the bond.

In brief, the well-settled rule in equity is this: "Whenever a party wilfully [or through gross negligence] misrepresents a fact to another, and on the strength of such false representation he is induced to alter his position, the former is precluded from setting up that the representation was not true."²

¹ *Pana v. Bowler*, 107 U. S. 529, 539; *Oregon v. Jennings*, 119 U. S. 74, 93; [*Ward v. Berkshire Life Insurance Co.* 108 Ind. 301; *Green's Appeal*, 97 Pa. St. 342; *Vulcan Iron Works v. Cyclone Plow Co.* 48 Fed. Rep. 652; *Shroyer v. Richmond*, 16 Ohio St. 455; *Blackburn v. Ball*, 91 Ill. 434; *Tobey v. Taunton*, 119 Mass. 404. For cases where the recital was held not to constitute an estoppel, see *Ninth National Bank v. Knox County*, 37 Fed. Rep. 75.]

² *Hinchley v. Greany*, 118 Mass. 595, *supra*.

CHAPTER XXXII.

PLEADING.

Bills in Equity.

915. A SUIT in equity is begun by a written petition addressed by the plaintiff to the Chancellor, or other proper judge, stating his case and praying for relief.

This petition is technically known as a bill in equity. Bills are divided into original bills and bills not original. An original bill, as the name imports, is one which begins the suit or controversy. Bills not original are those which are brought subsequently in the same suit in order to supply some defect, or to secure the continuance of the suit, commonly by introducing some new facts or some new necessary party; or the object may be to obtain a rehearing. Bills not original are subdivided into supplemental bills, bills of revivor, cross bills, bills of review, and bills in the nature of supplemental bills, etc.

An original bill, according to strict pleading, contains nine parts, as follows: —

(1) The address. The bill or petition is addressed to the proper judge, as in England to the Lord Chancellor, by his proper name and title. A bill in the United States Circuit Court would be addressed “To the Justices of the Circuit Court of the United States for the District of ——.” In the Supreme Court of Massachusetts, for example, a bill is addressed, “To the Justices of the Supreme Judicial Court within and for the County of ——.”¹

(2) The introductory part, which contains the names of the parties, usually in this form: “A B, of ——, brings this his bill of complaint against C D, of ——; and thereupon your orator complains and avers.”²

¹ [Sterrick v. Pugsley, 1 Flip. Lafayette Insurance Co. v. French, Cir. Ct. 350.] 18 How. 404.]

² [Muller v. Dows, 94 U. S. 444;

(3) The stating part of the bill. This is the real substance of the bill, for it contains, or should contain, a complete statement of the plaintiff's case, *i. e.* a narrative of the facts which constitute his grievance, and which connect the defendants therewith.¹

(4) The confederacy clause. It was formerly usual for bills to contain an averment that the defendants named were confederating with other persons, to the plaintiff unknown, to deprive him of his rights, and the bill prayed leave to join such persons as defendants when they should be discovered. It is said that the original object of this clause was to enable the plaintiff to add new defendants to his bill, should it be found necessary to make them parties. But this the plaintiff had a clear right to do without such an averment. It was merely formal, often absurd; it is now seldom used, and is never necessary.²

(5) The charging part. The bill sometimes, after stating the plaintiff's case, proceeds to enumerate the defences which, as the plaintiff is informed, the defendant intends to set up, and then the plaintiff proceeds to deny the existence or validity of such defences. This is called the charging part of the bill. It is a statement of the anticipated defences to the bill, and of the plaintiff's answer to those defences. For example, in a suit for specific performance of a contract to sell land, after stating the contract and all the facts essential to make out the plaintiff's case, the bill proceeds to allege that, according to the plaintiff's information, the defendant pretends that the contract was obtained from him by some fraud on the part of the plaintiff; and the bill goes on to deny the existence of such fraud.

These statements as to the defendant's supposed position are not a necessary part of the bill, but they are often useful as a means of compelling the defendant to make a fuller answer and disclosure than he might otherwise see fit to make.³

¹ [Cockrell v. Gurley, 26 Ala. 405, 408. No necessary allegation can be supplied by inference, nor by reference to other parts of the bill: Thompson's Appeal, 126 Pa. St. 367.]

² [Stone v. Anderson, 26 N. H. 506.]

³ [Harrison v. Farrington, 38 N. J. Eq. 1.]

(6) The jurisdiction clause. This clause avers that the plaintiff's case is within the jurisdiction of the court, and that he has no suitable relief at law. It is almost universally inserted, even at the present day, but it is not and never was necessary. If the case already stated in the bill is not within the equitable jurisdiction of the court, no subsequent averment that it is within such jurisdiction helps the matter, and its omission certainly does no harm.¹

(7) The interrogatory part. Formerly bills contained specific interrogatories addressed to the defendant, and based upon the stating part of the bill, which he was required to answer in detail. This was in fact a repetition, in the form of questions, of what was already contained in the stating part of the bill. The interrogatory part is now almost always disused. It certainly is not employed in the courts of the United States, or in those of Massachusetts. In its place there is a general prayer that the defendant be required to answer each and every allegation in the bill; and he is bound to do so without specific interrogatories.

(8) The prayer for relief. In this part the plaintiff asks the court to give him the relief which he desires, and it is a very essential part of the bill, because no relief will be given unless the bill asks for relief. All prayers for relief should be twofold: First, they should be specific, *i. e.* they should request the special relief which the plaintiff desires, and to which he considers himself entitled; and then, secondly, there should be a prayer for general relief, that is, for such other relief as the court may think he is entitled to have. The advantage of this is, that, if the plaintiff has made any error in specifying the relief asked for, the court will still, under the prayer for general relief, give him whatever relief they may think proper.² But this they could not do in the absence of such a general prayer.³

¹ [Botsford v. Beers, 11 Conn. 369, 373.]

² [Texas v. Hardenberg, 10 Wall. 68; Thompson v. Heywood, 129 Mass. 401; Danforth v. Smith, 23 Vt. 247; Treadwell v. Brown, 44 N. H. 551; Kelly v. Payne, 18 Ala. 371. As to when special relief will

not be granted under a general prayer, see Hayward v. National Bank, 96 U. S. 611; Simmons v. Williams, 27 Ala. 507; Chalmers v. Chambers, 6 H. & J. 29; Story's Eq. Pl. § 41.]

³ [Driver v. Fortner, 5 Port. (Ala.) 9.]

(9) The ninth and concluding part is the prayer for process to compel the defendants to appear and answer to the bill, and when an injunction is prayed for, the bill should also ask for a writ of injunction to be issued against the defendants.¹

916. This review shows that, of the ordinary nine parts of a bill, several are not really essential. The necessary parts are: (1) The address to the court; (2) the introduction, giving the names of the parties; (3) the stating part, which is in fact the substance of the bill; (4) the prayer for relief; (5) the prayer for process.

But the charging part, though not essential, is, as I have said, often introduced with advantage; and the jurisdiction clause is usually included by way of emphasizing the plaintiff's appeal to the equitable jurisdiction of the court. The bill which I have described is that adopted in the courts of the United States.²

A bill should always be signed by counsel for the plaintiff, as an assurance, it is said, that it is proper to be addressed to the court.³ Whenever a preliminary injunction is prayed for, the bill should also be sworn to by the plaintiff; otherwise, an oath to the bill is not required. Having now glanced at the general outline of a bill in equity, I shall proceed to consider, first, the essentials of a bill, and, secondly, the necessary parties to a suit in equity.

Essentials of a Bill in Equity.

917. The essentials of a bill in equity are two: It should contain enough; it must not contain too much.

¹ [Under the rules of the Federal courts, a bill is demurrable if it omits from the prayer for process the names of the defendants mentioned in the introduction: *Carlsbad v. Tibbetts*, 51 Fed. Rep. 852.]

² In Massachusetts, by the act of 1883, ch. 223, § 10, a sweeping change was made in the structure of bills. They are now reduced to the simplest form, the address to the

court, and the prayer for general relief and for process, being dispensed with; and it is provided that the bill may be signed either by the plaintiff or by his attorney.

³ [*Hampton v. Coddington*, 28 N. J. Eq. 557. If a bill brought by ten persons is signed by only two of them, it is the bill of those two only: *Chapman v. Banker, &c. Publishing Co.* 128 Mass. 478.]

The bill should state the plaintiff's case with such fulness and accuracy as to show upon its face that he is entitled to relief against the defendants.¹ It must show a case calling for equitable relief; and it must also show that the defendants are the proper parties against whom the relief is sought.

The case as stated in the bill must be sufficient of itself. This rule does not require the plaintiff to set forth in his bill the evidence by which he expects to sustain his case;² but he must set forth all the facts and circumstances which, taken together, constitute his case, that is, the grounds upon which he prays for relief.³

There is, or has been, one exception to this rule in the English practice. When the plaintiff intends to rely upon any confessions or admissions of the defendant in support of his case, it has been required in England that such admissions should be set forth in the bill. But, as stated by Judge Story,⁴ that rule has never prevailed in this country.

918. No facts are in issue except those properly averred in the bill.⁵ And the plaintiff can have a decree only upon proof of the case as stated in the bill. Thus, where the bill charged a case of fraud against the defendants, and the proof of fraud failed, but the evidence tended to prove ground for relief under a different head of equity, as Mistake, it was held that the bill must be dismissed.⁶

919. Whenever the title, contract, or interest upon which the plaintiff's case is predicated is by law required to be in writing, the bill must contain an allegation to that effect, or it will be demurrable.⁷

¹ [Perry v. Carr, 41 N. H. 371; Huntington v. Saunders, 14 Fed. Rep. 907; Dwight v. Smith, 9 Fed. Rep. 795; Aikin v. Ballard, Rice's Eq. (S. C.) 13; Smith v. Wood, 42 N. J. Eq. 563; Fox v. Pierce, 50 Mich. 500. But the bill need not allege what is necessarily implied: Townshend v. Duncan, 2 Bland, 45.]

² [St. Louis v. Knapp Co. 104 U. S. 658; Weisman v. Heron Mining Co. 4 Jones Eq. (N. C.) 112.]

³ [Marshall v. Turnbull, 34 Fed. Rep. 827.]

⁴ Story's Eq. Pl. § 265 a.

⁵ Story's Eq. Pl. § 257; [Russ v. Hawes, 5 Fredell's Eq. 18; White v. Morrison, 11 Ill. 361; Thomas v. Warner, 15 Vt. 110.]

⁶ Fisher v. Boody, 1 Curtis, C. C. R. 206.

⁷ [Wood v. Midgley, 5 De G., M. & G. 41; Young v. Wheeler, 34 Fed. Rep. 98; Percifield v. Black, 132 Ind. 384.]

If, for instance, the bill sets up an express trust in land, it must aver that the trust is in writing; or, if it claims performance of an agreement for the conveyance of real estate, it must aver that the agreement is in writing; or else it must set forth such part performance as will take the case out of the statute of frauds. Neither of these essentials can be left to the evidence, but the bill itself must state a complete case, anticipating any objection which otherwise would arise under the statute of frauds.

So, also, where the bill states a case to which the statute of limitations applies, it must aver the circumstances which take the case out of the statute, or it will be fatally defective.¹ The same is true when much time has elapsed and the objection of laches would apply. In asserting the claim, the bill must set forth the facts and circumstances which excuse the delay and apparent negligence, or it will be demurrable.²

920. The bill must not state two inconsistent cases; that is, the plaintiff must not affirm one set of facts as ground for relief, and then go on to state in the alternative a case which is directly opposite or contrary to that first set up. He cannot affirm and disaffirm in the same bill. For instance, a bill cannot aver that a contract has been obtained from the plaintiff by fraud and ask to have it cancelled, and then also ask, in case this allegation is not made out, that the defendant be required to perform the contract. Here the two cases presented by the bill are entirely inconsistent with each other: the first declares that the contract is void and ought to be annulled; the second proceeds on the assumption that it is valid and ought to be enforced against the defendant.³

But in *Hardin v. Boyd*⁴ the court, though professing not to overrule *Shields v. Barrow*, practically do so; and they go very far in favor of allowing a plaintiff to ask the court

¹ Story's Eq. Pl. § 484.

³ *Shields v. Barrow*, 17 How.

² *Landsdale v. Smith*, 106 U. S. 130; *Wilkinson v. Dobbie*, 12 391; *National Bank v. Carpenter*, Blatchf. 298.
101 U. S. 567.

⁴ 113 U. S. 756.

both to annul a contract on the ground that it is fraudulent, and failing that, to give him the benefit of it.¹

921. The plaintiff can never affirm and disaffirm the same title or transaction, and then ask for the alternative relief accordingly as the court may find the facts to be.² But it is permissible for the plaintiff to state his title or ground for relief in the alternative, — in other words, to set up two distinct grounds for relief, — provided that the relief prayed for is one and the same, whichever title or ground is maintained. Thus, where the plaintiff sets up a title to a fund or estate, both as the heir at law and as devisee of the testator, but asks only for the same fund or estate in each case, there is no inconsistency. If for any reason the will cannot take effect, and his title as devisee is gone, then his title as heir at law remains.

So, where a widow brought a bill to redeem a mortgage made by her husband, suing both as widow and as administratrix of his estate, since she had a right to redeem in one or both of these capacities, and the relief was the same in each contingency, the bill was not demurrable.³

Nor is error for the plaintiff to state cumulative grounds for the same relief, if they are not inconsistent with or contradictory of each other. Thus, as has been said, a bill may state, as the grounds for cancelling an agreement, first, that it was obtained by the fraud of the defendant; and, secondly, that the plaintiff was at the time insane, or imbecile, and not of mental capacity to contract.

922. ALTERNATIVE RELIEF. — A plaintiff may be in doubt sometimes as to what relief he is entitled to upon the case stated in his bill. In such an event he may frame his bill with a "double aspect," as it is called, *i. e.* he may pray for one relief, and, in case the court cannot grant him that relief, then for a different relief.⁴

It will be observed that in the case now supposed there is no uncertainty or duplicity in the title or facts which

¹ [McConnell v. McConnell, 11 Vt. 290.]

³ Robinson v. Guild, 12 Met. 323.

² [Lloyd v. Brewster, 4 Paige, 537.]

⁴ 1 Daniell's Ch. Pr. p. 385; [Strange v. Watson, 11 Ala. 324.]

the plaintiff states for relief; but, assuming his case to be true just as he states it, there may be some doubt as to the kind of relief which he should ultimately receive. Now in the nature of things there is no reason why in this uncertainty, not imputable to the fault of the plaintiff, he should not ask for such alternative relief as the court may think proper.

This uncertainty may arise from two causes: (1) Inasmuch as the precise kind of relief is often a matter of discretion with the court, a plaintiff may well doubt to what relief, as matter of law, he may be entitled under the particular circumstances of the case.

(2) More frequently the nature of the relief which the court can ultimately give depends upon the situation of the property and the acts and doings of the defendant in regard to it; and these facts may not be ascertained definitely until discovery is had from the defendant, or until they are brought to light by testimony at the hearing. In such a case, different forms of relief may well be prayed for in the alternative adapted to each contingency.¹

Thus, to take a familiar illustration, a bill may be brought to redeem stock pledged as collateral security, the bill stating that the debt has been paid, and that the defendant refuses to reconvey the stock. Now, if the plaintiff has reason to suspect that the defendant has disposed of the stock, he should pray for alternative relief, that is, his bill should ask for (1) a re-delivery of the stock pledged, or (2) that the defendant, if he has disposed of the stock, may account for its full value. So, also, in a bill against a trustee for conveyance of property charged with an implied trust, the plaintiff may ask for a conveyance, and in case the trustee has sold the property to a *bonâ fide* purchaser, that he may be compelled to account for its value.

Multifariousness.

923. A bill must not be multifarious. By multifariousness, as defined by Judge Story, and by the United States Supreme Court adopting his definition, "is meant the im-

¹ [Stein v. Robertson, 30 Ala. 286.]

properly joining in one bill distinct and independent matters, and thereby confounding them; as, for example, the uniting in one bill of several matters perfectly distinct and unconnected against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill.”¹ A bill is multifarious (1) when it unites several distinct and incongruous matters between the same parties; or (2) when it unites several matters, in all of which all the plaintiffs on the one side, or all the defendants on the other, do not have a joint and common interest.²

924. Let us analyze this definition: (1) If a plaintiff combines in one bill two matters against the same defendant, one on his own account and the other in some representative capacity, as that of administrator or trustee, the bill is multifarious.³ Thus, where an executor united in the same bill for an account transactions had by himself with the defendant, and also transactions of his testator with the defendant, Judge Story held the bill to be multifarious.⁴ But where a plaintiff simply claims the same relief by virtue of each of several titles held by himself, the bill is not multifarious. An example is, where a bill to redeem a mortgage was brought by the plaintiff both as widow and administratrix of the mortgagor.⁵

Nor is a bill multifarious because it charges the defendant with one and the same liability on several distinct grounds. Thus, where a bill by the creditor of a corporation against stockholders stated several distinct grounds upon which they were liable for his debt, it was held to be not multifarious.⁶ These grounds were simply different reasons for one and the same liability.

925. If a bill between two or more plaintiffs and two or more defendants sets up two or more matters, in one of

¹ Story's Eq. Pl. § 271; Walker v. Powers, 104 U. S. 245, 251.

² See the cases *supra*, and Metcalf v. Cady, 8 Allen, 587.

³ [Whitney v. Fairbanks, 54 Fed. Rep. 985.]

⁴ Carter v. Treadwell, 3 Story's Rep. 25.

⁵ Robinson v. Guild, 12 Met. 323, *supra*.

⁶ Pope v. Leonard, 115 Mass. 286.

which either all the plaintiffs or all the defendants are not jointly concerned, the bill is multifarious.¹

A bill by a creditor and shareholder in behalf of two distinct classes of shareholders, ordinary and preferential shareholders, whose interests were adverse, was held to be multifarious, and a demurrer *ore tenus* allowed.² So, a bill stating two alternative claims, some of the plaintiffs being interested in one claim and some in the other, but not all in both, was held to be multifarious. "Two alternative claims, each belonging to many persons, one of whom has no interest in one claim, and others of whom have no interest in the other claim, cannot be joined in one bill in equity."³

The case of *Sawyer v. Noble*⁴ is a good illustration of a bill multifarious because both defendants did not have a common interest in one of the matters set up in the bill. Sawyer and Noble were partners. The bill charged Noble with collusion with the other defendant, Randall, in making to him a fraudulent sale of some partnership property, and prayed that the sale might be set aside. The bill also charged Noble with other improper transactions as partner,

¹ *Walker v. Powers*, 104 U. S. 245, *supra*; [*Plum v. Morris Canal Co.* 10 N. J. Eq. 256; *Harland v. Person*, 93 Ala. 273; *Mayer v. Denver, &c. Co.* 38 Fed. Rep. 197. A creditor's bill to set aside different conveyances to several persons is not multifarious: *Graves v. Corbin*, 132 U. S. 571, 586; *Chase v. Searles*, 45 N. H. 511; *Pullman v. Stebbins*, 51 Fed. Rep. 10; *Hurd v. Ascherman*, 117 Ill. 501; *Boyd v. Hoyt*, 5 Paige, 65. See, also, *Lewis v. St. Albans Iron Works*, 50 Vt. 477; *Randolph v. Daly*, 16 N. J. Eq. 313.]

² *Ward v. Sittingbourne &c. Railway Co.* L. R. 9 Ch. App. 488. [A bill by several insurance companies to set aside awards against them was maintained: *Hartford Fire Insurance Co. v. Bonner Mercantile Co.* 44 Fed. Rep. 151. So, where two

partners were associated in two different firms, a bill for an accounting filed against both firms was held to be not multifarious: *Lewis v. Lopes*, 47 Fed. Rep. 259. So of a bill against the tax collectors of twelve different counties: *Northern Pacific Ry. v. Walker*, 47 Fed. Rep. 681. Formerly the joinder of plaintiffs in a suit to restrain a common nuisance was not allowed: *Hudson v. Maddison*, 12 Sim. 416. But the rule is now otherwise: *Cadigan v. Brown*, 120 Mass. 493; *First National Bank v. Sarlls*, 129 Ind. 201; *Middleton v. Flat River Booming Co.* 27 Mich. 533; *Mitchell v. Thorne*, 134 N. Y. 536, 542.]

³ *Stebbins v. St. Anne*, 116 U. S. 386, 392.

⁴ 55 Me. 227.

and prayed for a dissolution of the partnership, and for an account and settlement from Noble. The defendant Randall had no concern with the other improper acts of Noble as partner, nor with the settlement of the partnership affairs, and therefore the bill was clearly multifarious as to him.

In *Dial v. Reynolds*¹ a bill to foreclose a mortgage brought against the mortgagor, and also against one claiming title adversely to the mortgagor, was held to be multifarious. So, where a bill was brought by a creditor of a corporation to enforce a statute liability of the directors for the debt, and also to enforce a statute liability against the stockholders, the liability in each case being different, it was held to be multifarious.² When, however, the bill states a right to an account against A and B, and also that the plaintiff has a lien against A for the balance due, and the bill seeks that separate remedy against him, as well as relief against both for an account, it is not multifarious.³

926. The second class of cases is where the plaintiffs on one side and the defendants on the other have a common interest in all the transactions or matters set up in the bill, but the transactions themselves are so dissimilar and distinct that the court will not allow them to be brought together in one suit.⁴

Under this head of the subject much vagueness exists among the authorities as to what will amount to multifariousness, and a good deal depends upon the discretion of the court.⁵ As a general rule, however, it may be said that, whenever the several matters set up in the bill require entirely distinct and different kinds of relief, the bill is multifarious.⁶ Thus, if a bill were brought to enforce the

¹ 96 U. S. 340.

² *Cambridge Water Works v. Somerville Dyeing, &c. Co.* 14 Gray, 193.

³ *Manners v. Rowley*, 10 Sim. 470; *Story's Eq. Pl.* § 284.

⁴ 1 *Daniell's Ch. Pr.* 335 (6th Amer. ed.); [*Lehigh Zinc & Iron Co. v. New Jersey Zinc & Iron Co.* 43 Fed. Rep. 545.]

⁵ [*Warren v. Warren*, 56 Me. 360; *Fellows v. Fellows*, 4 Cowen, 682; *Scotfield v. City of Lansing*, 17 Met. 437; *Sapp v. Phelps*, 92 Ill. 588.]

⁶ [*In Cleland v. Casgrain*, 92 Mich. 139, this objection was taken but not sustained.]

specific performance of one contract, and also to cancel another on the ground of fraud or mistake, it would be multifarious. These two matters are wholly distinct, and require different and independent relief.

927. But where a bill was brought upon several patents, alleging that the several inventions described in the patents were all embodied in one machine made by the defendant, it was held not to be multifarious.¹ And this is common practice.

But if a bill should be brought on two or more entirely distinct patents relating to wholly different matters, as one to a sewing-machine and the other to a car-brake, it would be multifarious.

It has also been held that a bill brought to enforce the performance of two contracts for the sale of two distinct parcels of land, or to redeem two mortgages, is not necessarily multifarious;² but this decision may be open to doubt.

Impertinence.

928. A bill must not contain impertinent or scandalous matter. Impertinent matter is that which is wholly irrelevant and unnecessary, and thus tends to make the record improperly voluminous and expensive.³

A bill is scandalous when it introduces irrelevant matter which is also libellous or defamatory in its character. It must be irrelevant to be scandalous. It may often be necessary, especially in cases of fraud, to make averments very injurious to the character of the parties concerned. "But nothing which is positively relevant to the merits of the cause, however harsh or gross the charge may be, can be correctly treated as scandalous."⁴

The objection that a bill is impertinent or scandalous is

¹ Nourse v. Allen, 4 Blatchf. 376; The Horman Patent Manuf. Co. v. Brooklyn City Railroad Co. 15 Blatchf. 444.

² Robinson v. Guild, 12 Met. 323, *supra*.

³ [Woods v. Morrell, 1 Johns. Ch. 103; Leslie v. Leslie, 50 N. J. Eq.

155. The impertinence of the matter in question must be established very clearly: Dodd v. Wilkinson, 42 N. J. Eq. 647; Tucker v. Cheshire R. R. Co. 21 N. H. 29.]

⁴ Story's Eq. Pl. § 269. [See, also, *supra*, p. 476.]

made by exceptions¹ filed to the bill, setting forth the parts of the bill which are objected to on these grounds. When such objection is made, the court refers the matter to a master for his examination, and, if the charge is sustained, the obnoxious matter is ordered to be stricken out, and the plaintiff will be required to pay the costs. If the scandal is gross and wanton, the counsel who is guilty of it may also be subject to the discipline of the court for violation of his duty as an officer of the court.²

Bills not Original. — Supplemental Bills.

929. A supplemental bill is a bill brought by the plaintiff in the original suit in order to introduce some material fact affecting the case which has occurred since the beginning of the suit, or to introduce some new party who has become necessary since the beginning of the suit.³

The occasion for a supplemental bill does not arise from any error or omission in the original bill.⁴ If some material statement of fact, or some necessary party,⁵ has been omitted from the original bill, the omission may be cured by an amendment to the original bill. That is the office of an amendment. But facts sometimes occur after a suit has been instituted which are important to be brought before the court as supporting the plaintiff's right, or as affecting the kind of relief which the court should give him. So, also, a subsequent occurrence may create the necessity for some new party to be added to the suit.⁶ These new facts or

¹ [Not by demurrer: *Stirrat v. Excelsior Manuf. Co.* 44 Fed. Rep. 142.]

² [The court may stay a suit, or strike out an answer, if it be merely frivolous or vexatious, as when the plaintiff attempts to re-try a case already decided against him: *Reichel v. McGrath*, L. R. 14 App. Cas. 665.]

³ [*Wilderv. Keeler*, 3 Paige, 164; *Pinkus v. Peters*, 5 Beav. 253. See, also, *Daniell's Ch. Pr.* pp. 406, 407, and notes to 6th Amer. ed. Usually

a supplemental bill cannot be filed without leave of the court: *Edmonds v. Robinson*, L. R. 29 Ch. D. 170; *Buckingham v. Corning*, 29 N. J. Eq. 238; *Mackintosh v. Flint, &c.* R. R. Co. 34 Fed. Rep. 582, 614.]

⁴ [*Stafford v. Howlett*, 1 Paige, 200.]

⁵ [*Candler v. Pettit*, 1 Paige Ch. 168.]

⁶ [*Anonymous*, 2 Mol. (Ir. Ch.) 312; *Mole v. Smith*, 1 Jac. & W. 665; *Secor v. Singleton*, 41 Fed. Rep. 725.]

new parties must be introduced by a supplemental bill, *i. e.* a bill supplemental to the original bill.¹

Thus, if a bill is brought for the specific performance of a contract for the sale of land, and pending the suit the defendant conveys the estate to a third person, a supplemental bill is the proper mode of bringing that fact before the court; and the plaintiff may pray that the defendant be required to pay him the value of the estate, as a substitution for the relief originally asked for, or he may make the purchaser a party to the supplemental bill, charging him with notice, and asking that he, as well as the original defendant, may be required to convey the estate. Such a purchaser *pendente lite* is not a necessary party, because the decree is binding upon him in any event.²

930. To take a different case, a defendant may become bankrupt pending a suit. In that event it is necessary that his assignee, in order to be bound by the proceedings, should be made a party to them; and this must be done by a supplemental bill, because there was no assignee, and no necessity for one, at the time when the suit was begun.³

This is the rule as to involuntary alienation by a defendant, — alienation, that is, by insolvency or bankruptcy. Where a defendant voluntarily makes an assignment *pendente lite*, the plaintiff may or may not, at his election, make the assignee a party by a supplemental bill.⁴

In *Eyster v. Gaff*⁵ the court held that, under the United States bankruptcy law, an assignee in bankruptcy, appointed after a suit has been brought against the bankrupt, stands like any other purchaser *pendente lite*, and is bound by the decree whether he has been made a party or not. The court admitted, however, in *Stout v. Lye*,⁶ that in making this decision they had gone beyond the English rule.

¹ [It should be filed promptly : *Henry v. Travellers' Insurance Co.* 45 Fed. Rep. 299; *Mason v. Sanford*, 137 N. Y. 497.] ³ [*Sedgwick v. Cleveland*, 7 Paige, 287.] ⁴ *Story's Eq. Pl.* §§ 336, 342; [*Williams v. Winans*, 20 N. J. Eq. 392.]

² *Eyster v. Gaff*, 91 U. S. 521; [*Pond v. Clark*, 24 Conn. 370, 384; *Hixon v. Oneida County*, 82 Wis. 515.] ⁵ 91 U. S. 521. ⁶ 103 U. S. 66, 69.

931. The new matter introduced by a supplemental bill must be in respect to the same title or interest as that stated in the original bill.¹ A plaintiff is not allowed to introduce a new title, or to make out a different case, by a supplemental bill. A supplemental bill must be strictly in aid of the case stated in the original bill. If the plaintiff seeks to do more than this he must bring a new suit.

Thus, when a plaintiff brings a bill as heir at law, and it turns out that he is not the heir at law, and thereupon he buys the title of the real heir at law, and attempts to introduce this newly acquired title by a supplemental bill, he will not be allowed to do so. He now sets up an entirely new and distinct title as purchaser from the heir at law.²

So, also, where some fact material to the defence has occurred since the filing of the answer, the proper mode of introducing it is not by amendment of the answer, but by a supplemental bill in the nature of a cross-bill.³

Thus, according to the strict rules of pleading, if a defendant wishes to set up a release or other matter of discharge which has occurred since the answer was filed, he must do so by a supplemental bill. But under the modern practice with regard to amendments, which is more liberal, it is possible that such new matter might be introduced by amendment.

932. The second instance in which a supplemental bill has been held proper is where the plaintiff desires to amend his bill by the introduction of some fact or necessary party inadvertently omitted from the original bill, and the time for making such an amendment has passed.⁴

Formerly amendments were never allowed to a bill after the testimony had been taken and the cause was at issue. If, at that time, the plaintiff discovered a defect in his origi-

¹ [Miller v. Cook, 135 Ill. 190; Ch. R. 135; Banque Franco-Egyptienne v. Brown, 24 Fed. Rep. 106; Candler v. Pettit, 1 Paige, 168; Bannon v. Comegys, 69 Md. 411; Story's Eq. Pl. §§ 337 a, 393, 903; Hanby v. Henritze, 85 Va. 177.] [Barrington v. O'Brien, 2 Ball. & B. 140.]

² Story's Eq. Pl. § 339; Maynard v. Green, 30 Fed. Rep. 643.

⁴ [Goucher v. Clayton, 11 Jur. (N. S.) 462.]

³ Taylor v. Titus, 2 Edwards

nal bill, the only mode of remedying it was by means of a supplemental bill. The two cases, then, in which a supplemental bill was proper were (1) to introduce some new fact which had occurred since the filing of the bill, or some new party made necessary by an occurrence subsequent to the bill; and (2) to amend some defect in the original bill after the time for making amendments had lapsed.

This second office of a supplemental bill has now, in this country at least, ceased to exist. There is no stage of a cause, short of the final decree,¹ at which amendments may not be allowed by the court in its discretion.

In Massachusetts, by the twenty-fifth equity rule, supplemental bills have become unnecessary, for new matter may always be introduced by amendment to the original bill.

Bills of Revivor.

933. A bill of revivor is the proper mode of reviving, or rather of keeping alive, a suit which otherwise would abate by the death of the plaintiff or of the defendant.²

The death of either party abates a suit unless some mode is provided and resorted to for keeping it alive. Whenever a plaintiff dies, it is the right of his proper representative to bring a bill of revivor, setting forth his title as such representative, and asking that the suit may be revived and continued by him.

If the original suit concerned the personal estate of the deceased, then the proper party to the bill of revivor is his executor or administrator.³ If it concerned real estate, then his heirs at law or devisees should bring the bill.⁴ So, also, if a defendant dies pending the suit, the plaintiff may continue it by a bill of revivor against his proper representatives, — his executor or administrator, or his heirs at law or

¹ [For the case of an original bill in the nature of a supplemental bill, see *Ross v. Fort Wayne*, 58 Fed. Rep. 404. See, also, *Story's Eq. Pl.* § 345.]

² [A mortgagee who has foreclosed cannot revive a suit brought by the mortgagor: *Keokuk R. R. Co. v. Scotland Co.* 152 U. S. 318.]

³ [*Clarke v. Mathewson*, 12 Peters, 164. As to the proper course when the suit involves both real and personal estate, see *Owing's Case*, 1 Bland, 370, 409.]

⁴ [*Story's Eq. Pl.* § 354 a.]

devisees, — according to the nature of the property involved in the suit.¹

934. When two or more plaintiffs have brought suit in a joint capacity, the suit does not abate by the death of one of them, and there is no necessity for a bill of revivor.² Thus, where two or more creditors are suing in behalf of all, and one dies, the suit survives in the name of the surviving plaintiff, and no bill of revivor by the representatives of the deceased plaintiff is necessary or proper.

The same is true of a suit by partners,³ or by two or more executors or administrators, or by other persons acting strictly in a joint representative capacity. Nor does a suit against partners necessarily abate by the death of one of them, although it is undoubtedly the right of the plaintiff in such a case to introduce the representatives of the deceased partner as parties defendant, by a bill in the nature of a bill of revivor, just as it would have been his right to make them parties to the original bill, if the defendant partner had died before that bill was brought.

935. REVIVOR BY DEFENDANT. — If the plaintiff dies, and his representatives neglect to revive the suit, a defendant is entitled to do so in one event, namely, after a decree has been rendered in the case affecting or fixing the rights of the parties. He is entitled to the benefit of that decree (it may be entirely in his favor), and therefore it is his right that the suit should be revived and proceeded with until a final decree, because if the suit abates short of a final decree, all intermediate proceedings and interlocutory decrees become null and void.⁴

In Massachusetts, by the twenty-fifth equity rule, a bill of revivor by the plaintiff is made unnecessary, for new parties may be introduced by an amendment to the original bill. But a defendant can revive the suit only by bringing a bill for that purpose.

¹ [McDonald v. McMahon, 66 Ala. 115.]

² [Buchanan v. Malins, 11 Beav. 52; Boddy v. Kent, 1 Mer. 361.]

³ Preston v. Fitch, 137 N. Y. 41, 51.

⁴ Story's Eq. Pl. § 372; [Williams v. Cooke, 10 Ves. 406. A decree reviving a suit is a final decree: Terry v. Sharon, 131 U. S. 46.]

Cross-Bills.

936. A cross-bill is a bill brought by the defendant in a suit against the plaintiff in the same suit, or against other defendants in the same suit, or against such defendants and the plaintiff, touching the matters in question in the original suit.¹

It may be brought for two purposes: first, to obtain a discovery from the plaintiff or from co-defendants in aid of the defence to the original bill; or, secondly, to obtain some relief as to the matters in issue in the original bill.

Since, formerly, parties could not be examined or compelled to testify by the opposite party, a defendant in equity was allowed to file his cross-bill for discovery against the plaintiff, compelling him to disclose any facts within his knowledge material to the defence.² And such a bill might also be filed against a co-defendant where the defendants' interests were not joint, but several and adverse to one another, as is often the case.³ A defendant partner, for instance, could not support the common defence by a cross-bill of discovery against his copartner; but when two or more persons were sued as partners, and one asserted that he was not a partner, he was entitled, in order to support that independent defence, to a discovery from the other defendants as well as from the plaintiff.

937. The second purpose of a cross-bill is to ask for some relief in relation to the matters at issue under the original bill.

Under an original bill, the court must simply grant or deny the relief asked for by the plaintiff. It cannot proceed, after denying relief to the plaintiff, to give any specific relief to the defendant, although the justice of the case manifestly requires that the defendant should have such relief.⁴ Now the main purpose of a cross-bill by a defend-

¹ [See Story's Eq. Pl. (9th ed.) § 401.]

² [Kidder v. Barr, 35 N. H. 235. *Contra*, Mayor of Colchester v. —, 1 P. Wms. 595.]

³ [Evans v. Staples, 42 N. J. Eq. 584.]

⁴ [Howe v. South Park Commissioners, 119 Ill. 101; German v. Machin, 6 Paige, 288; Armstrong v. Chemical Bank, 37 Fed. Rep. 466; Schulz v. Schulz, 138 Ill. 665.]

ant is to ask for such relief as the case shows that he is entitled to; and upon such a bill the court can proceed to give the proper relief.

Thus, where a bill is brought to enforce specific performance of a contract, let us suppose that the defence set up and made out is, that the contract was obtained from the defendant by fraud, or that it was a forgery. Thereupon the court will refuse to enforce the contract and will dismiss the plaintiff's bill, but it cannot go further than that. It cannot pass to an active decree in favor of the defendant, that the agreement shall be delivered up and cancelled. Here comes in the office of a cross-bill. If the defendant desires such relief, he may bring a cross-bill averring the fraudulent character of the agreement and praying for the specific relief that it may be delivered up and cancelled.

There is one exception to the general rule. Where, upon a bill for specific performance, it appears that earnest-money has been paid by the defendant, and the bill fails, a decree for repayment of the earnest-money will be given, without the filing of a cross-bill.¹

938. A defendant cannot by means of a cross-bill introduce any new or distinct subject-matter not embraced in the original bill.² This rule, however, does not prevent the defendant from presenting by his cross-bill any new facts or circumstances relating to the subject-matter of the original bill which show that he in his turn is entitled to specific relief as against the plaintiff.

A court of equity will hear and determine the whole controversy, so far as it relates to the subject-matter brought

¹ *Adams v. Valentine*, 33 Fed. Rep. 1; *Turner v. Marriott*, L. R. 3 Eq. 744. [So, also, where, upon a bill for specific performance, the defendant sets up an agreement different from that stated in the bill, and prays specific performance of it, such relief may be granted without the filing of a cross-bill. *Fife v. Clayton*, 13 Ves. 546.]

² *Ayres v. Carver*, 17 How. 591; *Rubber Co. v. Goodyear*, 9 Wall. 807; [*Andrews v. Hobson*, 23 Ala. 219; *Gage v. Mayer*, 117 Ill. 632; *Slater v. Cobb*, 153 Mass. 22; *Galatian v. Cunningham*, 8 Cowen. 361; *Fidelity Trust Co. v. Mobile Street Ry. Co.* 53 Fed. Rep. 850; *Stonemetz Printers' Machinery Co. v. Brown Folding Machine Co.* 46 Fed. Rep. 851; *McMullen v. Ritchie*, 57 Fed. Rep. 104.]

before it by the plaintiff in his original bill, not only his side of the case, but also the defendant's side of the case, as it shall be presented and made to appear by his cross-bill.¹ Thus, in the case already stated of a contract for specific performance, the subject-matter of the contract being before the court on the plaintiff's bill, the court will, upon the defendant's cross-bill, order the contract to be cancelled.

In a recent case a bill was brought by one partner against another, averring that the defendant had violated the co-partnership articles, and praying that the partnership might be dissolved and a receiver appointed. The defendant filed a cross-bill, stating that he had been induced to enter the partnership by fraud; that he had contributed as a part of the capital his note, which was held by the plaintiff; and praying that the note should be cancelled, and that the plaintiff should be required to pay the amount due him. It was held that the cross-bill was properly brought.²

So, in a suit for infringement of a patent, the defendant asserted that he was the equitable owner of the patent, and brought a cross-bill setting up his title, and praying for a conveyance to him of the legal title. It was held that the cross-bill was proper.³ Where a bill was brought to foreclose a mortgage, and it appeared that the mortgagor had paid more than was due, a cross-bill for repayment was maintained.⁴

939. New parties cannot be introduced in a cause by a cross-bill.⁵ This rule was fully stated by Mr. Justice Curtis in *Shields v. Barrow*.⁶

¹ [Quick v. Lemon, 105 Ill. 578. The plaintiff may have his bill dismissed, but not the cross-bill, without the defendant's consent: Dawson v. Amey, 40 N. J. Eq. 494.]

² Richards v. Todd, 127 Mass. 167.

³ Brandon Manufacturing Co. v. Prime, 14 Blatchf. 371. But see Calverley v. Williams, 1 Ves. Jr. 210.

⁴ Hathaway v. Hagan, 59 Vt. 75.

⁵ [Defences that could have been made by answer cannot be set up in a cross-bill: Beck v. Beck, 43 N. J. Eq. 39; Glenn v. Clark, 53 Md. 580. Nor can the matters set up in the cross-bill be inconsistent with those alleged in the answer: Dill v. Shahan, 23 Ala. 694; Jackson v. Grant, 18 N. J. Eq. 145.]

⁶ 17 How. 130, 145, approved in Bank v. Carrollton R. R. 11 Wall. 624. Contra, Wheeler, J., in Brandon Manufacturing Co. v. Prime, 14

A defendant is never allowed to file a cross-bill until he has filed an answer to the original bill.¹

Bills of Review.

940. A bill of review is the only proper remedy to set aside a final decree and obtain a rehearing, if the term of the court at which the final decree was entered has expired.²

The bill of review lies only after a final decree has been made, and it must not be confounded with a mere petition or motion for rehearing. Until a final decree has been passed, a court of chancery has full power over all the proceedings in the case; it can alter or amend or annul any interlocutory decree, and it can, on mere motion, rehear the case, if it thinks proper to do so.³ But after a final decree has been entered, and the term at which the decree was passed has expired, this supervisory and amendatory power is gone.⁴ If any error has been committed, it can then be corrected only by a bill of review. A final decree in equity corresponds in some measure with a final judgment at law, and the bill of review corresponds to some extent with a writ of error at law.

A bill of review lies in two cases: First, to correct some error in law apparent upon the record.⁵ The error must appear upon the record itself,⁶ and the record, for this purpose, consists only of the pleadings and the decrees passed in

Blatchf. 371, *supra*. [In addition to the cases cited by Judge Wheeler are: *Jones v. Smith*, 14 Ill. 229; *Kanawha Lodge v. Swann*, 37 W. Va. 176. See, also, *Hatch v. Dana*, 101 U. S. 205, 214.]

¹ [A cross-bill may be filed without leave of the court: *Neal v. Foster*, 34 Fed. Rep. 496.]

² *Roemer v. Simon*, 91 U. S. 149; [*Stockley v. Stockley*, 93 Mich. 307; *Thruston v. Devecmon*, 30 Md. 210; *Leach v. Jones*, 11 R. I. 386.]

³ [*Pitman v. Thornton*, 65 Me.

95. See, also, *Wood v. Griffith*, 1 Mer. 35.]

⁴ [A decree becomes final after it has been approved and placed on the files of the court: *Thompson v. Goulding*, 5 Allen, 81; *Gilpatrick v. Glidden*, 82 Me. 201.]

⁵ [When it is brought upon this ground it may be filed without leave of the court: *Priestley's Appeal*, 127 Pa. St. 420.]

⁶ [*Goodhue v. Churchman*, 1 Barb. Ch. 596; *West v. Shaw*, 32 W. Va. 195; *Priestley's Appeal*, *supra*.]

the cause.¹ The evidence is no part of the record, and the bill of review does not lie to correct any alleged erroneous findings of fact. The findings of fact by the court in the original suit are conclusive.² They cannot be revised on a bill of review. Upon that bill the sole question is, whether, taking the findings of fact to be correct, any error of law has been committed in the proceedings. For example, the alleged error may be that, assuming all the facts stated in the bill to be true, the plaintiff shows no title, and therefore was not entitled to the decree rendered.

941. Mere formal errors will not justify a bill of review, and herein it differs from a writ of error. It can be based only on substantial errors, *i. e.* errors which show that some wrong decree or order has been made in the case.³

The bill must be brought in the same court in which the final decree in the original suit was passed.⁴ It is in effect a method, and the only method, of asking the court to revise its own decision upon matters of law in the original suit.

It does not lie to correct or reopen any matters which were within the discretion of the court in the original suit, for matters of mere discretion are never subject to revision or appeal. Such matters are the refusal or allowance of amendments.⁵

942. The second instance in which a bill of review lies is to obtain a rehearing when some material fact⁶ has been discovered⁷ or has occurred⁸ subsequently to the final decree.

¹ [Rawlings v. Rawlings, 75 Va. 76.]

² [Evans v. Clement, 14 Ill. 206; Kimberly v. Arms, 40 Fed. Rep. 548.]

³ Story's Eq. Pl. § 411; [Rodgers v. Dibrell, 6 Lea (Tenn.), 69; McCall v. McCurdy, 69 Ala. 65.]

⁴ [Neal v. Foster, 34 Fed. Rep. 496; Tansey v. McDonnell, 142 Mass. 220.]

⁵ Buffington v. Harvey, 95 U. S. 99; Thompson v. Goulding, 5 Allen, 81; Story's Eq. Pl. §§ 405, 407.

⁶ [Aholtz v. Durfee, 122 Ill. 286; Lorentz v. Lorentz, 32 W. Va. 556.]

Merely cumulative evidence is not sufficient: Livingston v. Hobbs, 3 Johns. Ch. 124. But the evidence may be oral as well as written: Traphagen v. Voorhees, 45 N. J. Eq. 41; Thomas v. Rawlings, 34 Beav. 50.]

⁷ [Facts known to the plaintiff's attorney at the time of the hearing, but unknown to the plaintiff, are not "newly discovered." Greenlee v. McDowell, 4 Ired. Eq. 481.]

⁸ [A patent was held invalid in

If the material fact has occurred since the rendition of the final decree, the bill of review should so state, and it should also show that the effect of this new fact is to render the existing decree for some reason unjust.¹ If the bill proceeds upon the ground that the existence of material facts has been discovered since the former decree, it must also allege and show that the new testimony could not have been obtained at the first trial by the exercise of reasonable diligence.² The granting of a bill of review upon this second ground is always a matter of discretion with the court. It is in effect a motion for a new trial on the ground of newly discovered evidence, and such motions are always addressed to the discretion of the court.³ Leave of court must be obtained before a bill of review for this purpose can be filed.⁴

943. A bill of review, in analogy to a writ of error, must be brought in the Federal courts within two years from the date of the final decree, if its object is to correct an error of law.⁵ If it is brought on the ground of newly discovered evidence, then presumably it must be filed within two years at the utmost from the time of such discovery; any inexcusable delay in bringing the bill would probably be held fatal. In Massachusetts, where by statute writs of error and re-

the United States Circuit Court on the strength of a decision to the same effect by the United States Supreme Court. Afterward, in another suit, the Supreme Court reversed its former decision and sustained the patent; but it was held that this was not ground for a bill of review in the Circuit Court: *Tilghman v. Werk*, 39 Fed. Rep. 680. But where an injunction had been issued to enjoin a nuisance, and subsequently the nuisance was made legal by statute, a bill of review was maintained: *Sawyer v. Davis*, 136 Mass. 239.]

¹ [*Brown v. Vermuden*, 1 Ch. Cas. 272.]

² *Beard v. Burts*, 95 U. S. 434,

436; *Story's Eq. Pl.* §§ 412, 413; [*Brainard v. Morse*, 47 Vt. 320; *Perkins v. Partridge*, 30 N. J. Eq. 559; *Stevens v. Hey*, 15 Ohio, 313; *Banks v. Long*, 79 Ala. 319. And there must be no delay after the facts are ascertained: *Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207.]

³ [*Winchester v. Winchester*, 1 Head, 460, 488; *Ketchum v. Breed*, 66 Wis. 85.]

⁴ *Story's Eq. Pl.* § 412; [*Massie v. Graham*, 3 McLean, 41; *Hatcher v. Hatcher*, 77 Va. 600; *Winchester v. Winchester*, *supra*.]

⁵ [*Ensminger v. Powers*, 108 U. S. 292; *McDonald v. Whitney*, 39 Fed. Rep. 466.]

view at common law must be brought within one year from the rendition of the judgment, a bill of review in equity must be filed within one year after rendition of the final decree, if the bill is based upon an error of law. If it is based upon newly discovered evidence, it must be filed within one year after the discovery of such evidence.¹

¹ *Conant v. Perkins*, 107 Mass. 79, 82; *Evans v. Bacon*, 99 Mass. 213.

CHAPTER XXXIII.

NECESSARY PARTIES.

944. A COURT of equity has two objects in view in every case. Its first object is, so far as possible, to hear and determine the whole controversy relating to the subject-matter at issue, once for all, in a single suit, in order that a multiplicity of suits may thus be prevented. The other object is that no decree shall be passed affecting the rights of one who has not had an opportunity to be heard, who, as the phrase runs, has not had his day in court. This second object is, of course, the more important one; and therefore it often happens that, on account of the unavoidable absence of parties, as for example when they are *ex re*, the first object cannot be accomplished fully, and the controversy can be concluded only so far as it affects the parties actually before the court.

There is an important distinction to be noted here between proper parties and necessary parties. Proper parties are those who are interested in the subject-matter of the controversy, and who are within the jurisdiction of the court, but whose presence is not indispensable.¹ Necessary parties are those immediately concerned in the object of the suit, as distinguished from its subject-matter, without whose presence no hearing or decree can be had.² The more material

¹ [Traders' Bank v. Campbell, 14 Wall. 87; Weed v. Beebe, 21 Vt. 495; Jerome v. McCarter, 94 U. S. 734; Smith v. Chapman, 4 Conn. 334; Farmers' & Mechanics' Bank v. Polk, 1 Del. Ch. 167. In President of Bowdoin College v. Merritt, 54 Fed. Rep. 55, it was held that the *cestuis que trustent* might bring an action to remove a cloud on the title to the trust property, the trustees having declined to act; and, further, that it was not necessary that all the *cestuis* should join in the suit.]

² [Gregory v. Stetson, 133 U. S. 579; Jessup v. Illinois Central R. R. 36 Fed. Rep. 735; Howell v. Foster, 122 Ill. 276. For examples of parties concerned but not "immedi-

inquiry for us is, who are necessary parties, — necessary as plaintiffs and necessary as defendants.

Necessary Parties Plaintiff.

945. Whenever the suit is based upon a joint title or interest, all the persons sharing in the title or interest should unite as plaintiffs in the suit.¹ Partners and co-contractors suing third persons are familiar illustrations of this rule.

946. When the legal title is in one person and the equitable interest in another, both persons, as a rule, must join in any suit against third persons affecting the equitable interest.²

The better doctrine now is, that inasmuch as the assignee of a chose in action may sue for it at law in the name of the assignor, there is no jurisdiction in equity simply to recover the debt; but when, for any reason, relief in equity is necessary, as where the thing assigned is a merely equitable interest, the assignor should be joined with the assignee as co-plaintiff.³

947. As a rule, in all suits respecting trusts, brought either by or against the trustees, the *cestuis que trustent*, as well as the trustees, are necessary parties.⁴

ately concerned," see *Wendell v. Van Rensselaer*, 1 Johns. Ch. 344; *Whelan v. Whelan*, 3 Cowen, 537.]

¹ [*Trade Savings Bank v. Freese*, 26 N. J. Eq. 453; *Boughton v. Allen*, 11 Paige, 321. As to tenants in common, see *Borden v. Curtis*, 46 N. J. Eq. 468; *Howth v. Owens*, 29 Fed. Rep. 722. In a petition for partition, all the cotenants must appear either as plaintiffs or defendants: *Ferris v. Montgomery Land Co.* 94 Ala. 557.]

² [*Stimpson v. Rogers*, 4 Blatchf. 333.]

³ 1 Daniell's Ch. Pr. 197; [*Story's Eq. Pl.* § 153; *Eureka Marble Co. v. Windsor Manuf. Co.* 47 Vt. 430; *Miller v. Whittier*, 32 Me. 203; *Day v. Cummings*, 19 Vt.

496; *Montague v. Lobdell*, 11 Cush. 111.]

⁴ *Story's Eq. Pl.* § 207; [*Moore v. Hood*, 9 Rich. Eq. (S. C.) 311. Suits respecting the trust property cannot ordinarily be brought by or against the *cestuis que trustent* without the trustee: *Cope v. Parry*, 2 Jac. & W. 538; *East Haddam Baptist Church v. East Haddam Baptist Society*, 44 Conn. 259. But it has been held that the trustee under a railroad deed of trust is not a necessary party to a bondholder's suit to compel performance by the railroad company of its agreements in the deed, — the bill not seeking to reach the property held in trust: *Spies v. Chicago, &c. R. R. Co.* 30 Fed. Rep. 397.]

But this is far from being universally true. There is at least one important exception: when the suit is brought by the trustee simply to recover the trust property from the hands of third persons, or to reduce it to possession (so as to enable the trustee to hold and administer it thereafter agreeably to the trust), and the suit in no wise affects his relations with the *cestuis que trustent*, it is unnecessary to make the latter parties. In such a case the trustee sufficiently represents the beneficiaries. If, however, the object of the bill is to recover the trust funds with a view to their administration by the court in the same suit, the parties interested, the beneficiaries, must be represented.¹

948. Where the parties jointly interested are very numerous, as the creditors of a particular debtor, or members of some voluntary association, or stockholders in a corporation, the court, as a matter of convenience, will permit a suit to be brought by one or more in behalf of all.²

949. Where the parties are not numerous, but some of them, having a common interest with the others, refuse to join in a suit for the protection of the common right, the bill may be brought by the others, and in that case those who refuse to join as plaintiffs must be made defendants.³ For example, when a bill is brought charging a trustee with any malfeasance which affects all the *cestuis que trustent*, if some of them refuse to join as co-plaintiffs, the plaintiffs must make an allegation to that effect, and join them as defendants.

And whenever, in short, there is a diversity of interest between the different members of an association or partner-

¹ *Carey v. Brown*, 92 U. S. 171; 11 R. I. 195; *Ross v. Crary*, 1 Paige, 416; *Horsley v. Fawcett*, 11 Beav. 565; 416, note; *New London Bank v. Lee*, 11 Conn. 112; *Good v. Blewitt*, 13 Ves. 397. It must appear by the bill that the parties have a common interest, and that the suit is brought in behalf of all of them: *Story's Eq. Pl. § 99.*

² *Smith v. Swormstedt*, 16 How. 288, 302; *Birmingham v. Gallagher*, 112 Mass. 190; *Snow v. Wheeler*, 113 Mass. 179; *Story's Eq. Pl. §§ 99-102, 107*; [*Hazard v. Durant*,

³ [*Freeman v. Scofield*, 16 N. J. Eq. 28; *Bartlett v. Parks*, 1 Cush. 86; *Morse v. Hovey*, 9 Paige, 197; *Lovell v. Farrington*, 50 Me. 239.]

ship, in any suit brought to adjust its affairs all must be made parties, however numerous they may be, either as plaintiffs or defendants.¹

Necessary Parties Defendant.

950. The rule as to defendants is, that, where a person will be affected directly by the decree, he is an indispensable party, and the court will not entertain the suit without him.² If he is beyond the jurisdiction of the court, and so cannot be made a party, the bill must be dismissed.³

A party is directly affected by a decree whenever its operation is (1) to charge him with any liability;⁴ (2) to alter or rescind his contracts; or (3) to affect his title or interest in any property.

951. WHEN THE BILL CHARGES A PARTY WITH ANY LIABILITY. — Whenever the object of the bill is to take and settle an account, all the parties to the account, for or against whom a final balance may be found, are necessary parties.

For this reason, in all suits between partners to settle and adjust partnership affairs, every partner is a necessary party, because he has a direct personal interest in the account, and the final decree must determine what he is to receive from, or pay to, his copartners upon the final settlement.

The same rule is applicable to all co-contractors or quasi-partners in suits between themselves.

If one partner is outside of the jurisdiction, the court will proceed to a decree, if this can be done without injustice to the absent partner, otherwise not.⁵

In *Towle v. Pierce*⁶ the bill was sustained on the ground that the absent partner really had no interest in the matter, and would not be affected by the decree. In *Bank v. Carrollton*⁷ the absent partners were held to be necessary parties and the bill was dismissed.

¹ *Evans v. Stokes*, 1 Keen, 24.

⁴ [*Busby v. Littlefield*, 31 N. H.

² [*Herrington v. Hubbard*, 2 Ill. 193; *Lyman v. Bonney*, 101 Mass. 562.]

³ *Shields v. Barrow*, 17 How. 130, 139; *Williams v. Bankhead*, 19 Wall. 563; [*Barney v. Baltimore*, 6 Wall. 280.]

⁵ *Story's Eq. Pl.* § 78.

⁶ 12 Met. 329.

⁷ 11 Wall. 624.

If a creditor or other person sues a partnership in equity, all the partners should be joined as proper parties ; but the absence of any one partner will not defeat the suit, because each partner is liable to the creditor for the whole debt, and each represents the others in such a suit.¹ The partnership assets are supposed to be in the possession and control of each partner as well as of all the partners in common.

952. For the same reason, in all suits for account between the trustees on one side and the *cestuis que trustent* on the other, all the *cestuis que trustent* as well as the trustees are necessary parties, as a general rule, because each *cestui que trust* is interested in, and will be bound by, the final account.²

But where there is more than one trustee, it is not necessary that all the trustees should be made parties defendant in a suit in behalf of the *cestuis que trust*, if any of the trustees are beyond the jurisdiction of the court.

If trustees refuse to render a proper account, or if they commit any malfeasance in their trust, then they become wrong-doers : each one is responsible for the whole wrong ; and the beneficiaries may sue one or all of the delinquent trustees, and the non-joinder of the rest is no ground of objection to the bill.

If trustees who refuse to surrender the property, or to render proper accounts, could defeat the jurisdiction of the court on the ground that some resided in one State and some in another, so that no one court could obtain personal jurisdiction over all of them, gross injustice would be done, and delinquent or fraudulent trustees might go entirely free. But this will not be tolerated ; and the court will hold those trustees to account who are within its jurisdiction.³

953. WHEN THE BILL SEEKS TO ALTER OR RESCIND A CONTRACT. — Whenever the object of the bill is to alter or

¹ [Darwent v. Walton, 2 Atk. 510; Milligan v. Milledge, 3 Cranch, 220.]

² Phillipson v. Gatty, 6 Hare, 26; Greene v. Sisson, 2 Curtis C. C. Rep. 171.

³ Hazard v. Durant, 19 Fed. Rep. 471; Heath v. Erie Railway Co. 8 Blatchf. 347, 411; Story's Eq. Pl. § 213.

rescind a contract or other transaction, all the parties to the contract or transaction are necessary parties, because they would be affected directly by any final decree.¹ This was expressly held in *Shields v. Barrow*,² where one object of the bill was to set aside a contract of compromise. A like decision was made in *Florence Sewing-Machine Co. v. Singer Manufacturing Co.*³ In that case the bill was brought by licensees under a patent alleging that certain acts of the several licensors (three separate corporations) had operated, under the license contract, to reduce the rate of license fees, and praying for a decree to that effect. The court held that all the licensors were necessary parties defendant to the bill. A contrary decision was made in *Florence Sewing-Machine Co. v. Grover & Baker Sewing-Machine Co.*⁴

In *Ribon v. Railroad Companies*⁵ the bill was brought to set aside an alleged fraudulent foreclosure of a mortgage upon a railroad. It was held that to this bill all the stockholders who united in the foreclosure were necessary parties.

954. WHERE THE DECREE WILL AFFECT THE TITLE OR INTEREST OF A PARTY IN ANY PROPERTY. — In every such case he is a necessary party to the suit.⁶

Whenever the plaintiff sets up a title to or interest in any property which the bill shows is held or claimed by several persons, it is obvious that all the persons thus asserting an adverse claim to the property are necessary parties, because the effect of any decree in favor of the plaintiff would be to transfer the property from them to the plaintiff.

But the rule which we are now considering has a much wider application than this. One or two illustrations may tend to show its real scope.

¹ [Samis v. King, 40 Conn. 298, 312; City of Anthony v. The State, 49 Kan. 246. But see Hamilton v. Savannah, &c. Ry. Co. 49 Fed. Rep. 412.]

² 17 How. 130.

³ 8 Blatchf. 113.

⁴ 110 Mass. 1.

⁵ 16 Wall. 446.

⁶ [Dow v. Jewell, 18 N. H. 340; Zelle v. Workingmen's Banking Co. 10 Bradw. (Ill.) 335; Rowell v. Jewett, 69 Me. 293. So, in a bill to redeem, the heirs of a deceased mortgagee, as well as his personal representatives, must be joined: Hilton v. Lothrop, 46 Me 297.]

Whenever a bill is brought to establish any rights under a will, all the parties who, by any possible construction of the will, may have an adverse claim to the same property are necessary parties.¹ Thus, when one claims as a specific legatee, and it is possible that the will might be construed so as to give the property in question to the residuary legatee, the residuary legatee is a necessary party.² And so, if possibly a question might arise between a devisee and the heirs at law of the testator, the latter are necessary parties.³

Generally, when a bill is brought to establish a claim to, or to secure payment out of, a certain fund, all other claimants to the same fund are necessary parties.⁴

955. To the rule, that all persons who will be affected by a decree must be made parties defendant, there are two exceptions. First, if they are so very numerous that it is impracticable or extremely inconvenient to include them all in the suit, then a few of the number may be sued as representing all.⁵ This, however, is permissible only when all the defendants have one common interest, as in the case of a suit against a voluntary association; so that by no possibility can the rights of the absent defendants be affected injuriously.⁶

The second exception is where there is a fund, within the jurisdiction of the court, upon which a creditor has some lien, or to which he is entitled to resort for payment.

If the debtor himself is beyond the jurisdiction of the court, so that he is not amenable to its process, the court will nevertheless entertain the bill so far as to decree relief against the fund within its jurisdiction, — giving, however, to the debtor notice of the suit, and an opportunity to come in and defend it if he will. In such a case the bill should include the debtor as a defendant, and pray for notice to him; and this notice the court will always order to be given.

No injustice is done to the debtor by this course, and

¹ [*Pray v. Belt*, 1 Pet. 670.]

² [But see *Melick v. Melick*, 17 N. J. Eq. 156.]

³ *Sears v. Hardy*, 120 Mass. 524;
Bates v. Dewson, 128 Mass. 334.

⁴ *Railroad Co. v. Orr*, 18 Wall.

471; [*Mitchell v. Leroy*, 2 Paige, 280; *Smith v. Farr*, 3 You. & Coll. 328, 339.]

⁵ [*Stimson v. Lewis*, 36 Vt. 91.]

⁶ *Story's Eq. Pl.* § 116.

certainly it results in justice to the creditor. It would be a reproach to the law if a debtor, by his voluntary absence, could prevent the court from applying his property to the just payment of his debts.¹

It is to be observed that in such cases the decree is not against the absent defendant personally, but only against the fund or property within the jurisdiction of the court, and it has no force or effect beyond that property. In Massachusetts the right of a creditor to pursue such property, although the debtor himself may be absent, is now also secured by statute.² There is a similar provision in the United States Revised Statutes (§ 738).

Objections to the Want of Parties.

956. The objection that there is a lack of necessary parties may be taken by demurrer, plea, or answer, according to circumstances.³

(1) Where it is apparent upon the face of the bill itself that additional parties should be before the court, the objection should be taken by demurrer to the bill.⁴

(2) But the existence or necessity of other parties may not always appear in the bill itself. It may depend upon a fact which has not been stated in the bill, and which must therefore be brought to the knowledge of the court in some other way. In such a case the objection must be presented by a plea to the bill. The plea must set forth the matter required to show that in point of fact there are necessary parties to the suit other than those named in the bill.

(3) The objection of want of parties may also be taken in the answer, both when the defect is apparent upon the face of the bill, and also when it is necessary to bring some new facts before the court in order to show the existence of other essential parties.⁵

¹ *Spurr v. Scoville*, 3 Cush. 578, defend: *Melick v. Melick*, 17 N. J. 582; *Moody v. Gay*, 15 Gray, 457. Eq. 156.]

² Pub. Stats. ch. 151, § 2, clause 4 [*Cockburn v. Thompson*, 16 Ves. 321.]

³ See, also, *Moody v. Gay*, supra. ⁵ [*Robinson v. Smith*, 3 Paige, 222.]

⁴ [Not by a petition for leave to

In other words, the answer may contain a demurrer for want of parties, or it may perform the office of a separate plea by setting forth the same matter that a plea should do to show the existence of other parties.¹

(4) Finally, when the absent parties are not merely formal parties, but are really necessary parties, in the sense that no decree can be made without affecting their interests, the objection may be taken at the hearing; and, indeed, the court itself will take notice of such a defect *sua sponte*, and will either dismiss the bill for want of parties, or order the case to stand until the necessary persons are made parties, where this can be done. If, owing to their being beyond the jurisdiction of the court, they cannot be made parties, the bill will be dismissed.²

Misjoinder of Parties.

957. I have thus far considered who are necessary parties to a suit, and the effect of not joining them therein; in other words, I have treated of non-joinder.

But parties are sometimes joined in a suit either as co-plaintiffs or defendants who are not proper parties to the suit, *i. e.* there is a misjoinder of parties. This, however, is of little importance compared with the non-joinder of necessary parties.

If one is joined as co-plaintiff who has no common title or interest in the subject-matter with the other plaintiffs, it is a case of misjoinder of plaintiffs. For example, it would be a misjoinder if an agent should unite with his principal in a bill to enforce an agreement made by him in behalf of the principal. The bill should be brought by the principal alone, although the transaction may have been conducted by the agent.³

All objections to the misjoinder of plaintiffs should be

¹ 1 Daniell's Ch. Pr. pp. 286-291, 6th (Amer.) ed.

² *Hoe v. Wilson*, 9 Wall. 501; [*Schworer v. Boylston Market Association*, 99 Mass. 285, 295.]

³ [If the contract made by the

agent does not show that he acted as an agent, the agency must be alleged by the principal in his bill. See 1 Daniell's Ch. Pr. 196, and note to 6th Amer. ed.]

taken by demurrer.¹ If they are not thus taken, the court will not regard them at the hearing.² The effect of such a mistake, when it is demurred to, is only to require the plaintiff to amend his bill by striking out the name of the unnecessary plaintiff.

A misjoinder of defendants is made whenever a person is joined as defendant against whom the bill states no case for relief. For instance, in a bill to enforce an agreement signed by an agent for his principal, joining the agent as co-defendant would be improper.

This objection, also, should be taken by demurrer, and it can be taken only by the defendant improperly joined. It cannot be taken by the other defendants.³

Bills by Married Women and Infants.

958. When bills are brought by married women or infants, they should sue "by their next friend." The woman should not sue by her husband, nor the infant by his guardian.⁴

In all suits against infants, they alone should be named as defendants in the bill, and service should be made upon them, not upon any supposed guardian. After service the court should be asked to appoint a guardian *ad litem* for the infant.⁵ In all suits against married women, the husband should be joined as defendant, except in those cases where he sues as plaintiff, or where he is out of the country; and the answer should be their joint answer, except under special circumstances.⁶

In Massachusetts a married woman may now sue and be sued as *feme sole*, except that no suits between husband and wife are authorized by the statute.⁷

¹ [Stookey v. Carter, 92 Ill. 129.]

² [Veghte v. Raritan Water Power Co. 19 N. J. Eq. 142.]

³ Story's Eq. Pl. § 544; [Peoria, &c. Ry. Co. v. Pixley, 15 Brad. (Ill.) 288; Sweet v. Converse, 88 Mich. 1; Miller v. Jamison, 24 N. J. Eq. 41.]

⁴ [Nor by attorney: Foxwith v. Tremaine, 1 Vent. 102.]

⁵ Story's Eq. Pl. § 70; [Grant v. Van Schoonhoven, 9 Paige, 255.]

⁶ Story's Eq. Pl. § 71; [Bowers v. Smith, 10 Paige, 193, 201. A married woman cannot maintain a suit in her own name; her husband must always be joined as plaintiff, unless he is an adverse party, when he must be made a defendant: Wilson v. Wilson, 6 Ired. Eq. (N. C.) 236; Spring v. Sandford, 7 Paige, 550; Bradley v. Emerson, 7 Vt. 369.]

⁷ [Mass. Pub. Stats. ch. 147;

The citizenship or residence of the infant, and not of the *prochein ami*, determines the jurisdiction of the court.¹

Process to Defendant.

959. The plaintiff files his bill in the clerk's office of the court. Thereupon a writ of subpœna is issued to the defendant requiring him to appear and answer to the plaintiff's bill by a day named therein. The days for appearing, and also for filing answers, or other pleadings, are fixed by standing rules of the court, and are called Rule days.

Rule days are commonly the first Monday of every month, and the defendant in the United States courts must appear at the first Rule day which occurs after the lapse of twenty days from the time when process was served upon him. (In the state courts of Massachusetts this period is fourteen days.) His answer or other pleading must be filed on or before the next Rule day thereafter.

Subpœnas issued by the Federal courts must be served by the United States marshal or by his deputy. Subpœnas issued by the state courts are served by the sheriff or his deputy.

960. WRIT OF NE EXEAT REGNO. — This writ is peculiar to courts of equity. It is issued upon the filing of a bill, and its purpose is to prevent the defendant from going abroad without furnishing security. It is granted only upon motion, and only when the bill states a grievance the remedy for which is in equity and not at law, and the damages for which can be estimated in money.²

Forbes v. Tuckerman, 115 Mass. 115.] ¹ [Dodd v. Ghiselin, 27 Fed. Rep. 405.]

² 2 Daniell's Ch. Pr. 1706, 1707.

CHAPTER XXXIV.

DEFENCES TO BILLS.

961. THERE are four modes in which the defence to a bill may be made. It may be by demurrer, by plea, by answer, or by disclaimer.

Each of these modes of defence may go to the whole of the bill or only to part of it, so that as to one part of the bill the defendant may demur, as to another part he may plead, to a third part he may answer, and to a fourth part disclaim, according to the nature of the case.

Demurrers.

A demurrer is in effect an assertion by the defendant that, owing to some defect of form or of substance, the plaintiff is not entitled to any relief upon the case stated in the bill. This is the simple question which a demurrer presents for adjudication, namely, that the plaintiff's case, taking it just as he states it, gives him no right to any relief.¹

962. A demurrer admits the truth of every fact well pleaded in the bill,² but it does not admit any statements or inferences of law. Whatever legal deductions or inferences the bill may contain, based upon the facts stated in it, the demurrer does not admit their accuracy.³ For example, it

¹ [Lincoln v. Purcell, 2 Head, 143.]

² [Gage v. Bailey, 115 Ill. 646; Pearson v. Tower, 55 N. H. 215. But the allegations of the bill are construed against the pleader: Birmingham Warehouse Co. v. Elyton Land Co. 93 Ala. 549; Lawrence v. Traner, 136 Ill. 474, 484; People v. Wang, 92 Cal. 277. A bill for the specific performance of a con-

tract to deliver bonds is demurrable if it fails to show that the damages recoverable at law would be inadequate: Angus v. Robinson, 62 Vt. 60. See, also, Porter v. Frenchman's Bay, &c. Co. 84 Me. 195.]

³ [Pullman Palace Car Co. v. Missouri Pacific Ry. Co. 115 U. S. 587, 596; Chicot County v. Sherwood, 148 U. S. 529; Cornell v. Green, 43 Fed. Rep. 105; Thompson v. National

does not admit the legal construction given by the bill to an instrument referred to therein and annexed thereto.¹

A demurrer must be based entirely upon the facts stated in the bill. It cannot invoke in its support any fact whatever which is not contained in the bill,² excepting those facts of which the court takes judicial notice.³

963. Demurrers are either general or special. A general demurrer is one which merely states in broad terms that the bill presents no case for equitable relief, without assigning any other reason. A special demurrer is one which assigns the special objections to the bill, — the special causes of demurrer.

All merely formal objections must be taken by special demurrer; such objections will not be considered or noticed under a general demurrer.⁴ A special demurrer (followed by a general one) is preferable in any case. It sets forth on the record before the court the objections intended to be raised, — and in many States the rules of court now require the special causes for demurrer to be assigned in all cases.

The causes for demurrer may relate (1) to the jurisdiction of the court, (2) to the character or number of the parties, or (3) to the form or substance of the bill.

964. DEMURRER TO THE JURISDICTION. — The first ground of demurrer may be that the court in which the suit is brought has no jurisdiction over the parties, or over that particular case.

In the United States this objection is taken chiefly in the Federal courts, and there it is very common. By the Constitution and laws of the United States, those courts have jurisdiction only over specified matters and persons; and if the allegations of the bill fail to show jurisdiction either

Bank of Redemption, 106 Mass. 128; Pearson v. Tower, 55 N. H. 36. Fraud, being a conclusion of law, is not admitted by demurrer: Fogg v. Blair, 139 U. S. 118; United States v. Des Moines, &c. Co. 142 U. S. 510, 544.]

¹ Dillon v. Barnard, 21 Wall. 430.

² [Story's Eq. Pl. § 453, note 3.]

³ [As to what these are, see 1 Daniell's Ch. Pr. 546, and notes to 6th Amer. ed.]

⁴ [Wilson v. Hill, 46 N. J. Eq. 367; Billings v. Mann, 156 Mass. 203; Stewart v. Flint, 57 Vt. 216.]

as to subject-matter or parties, the proper mode of objecting to the want of it is by demurrer.¹

This, however, is not the only mode. Being a matter of jurisdiction, the court itself will take notice of it, and will dismiss the bill whenever the objection becomes apparent.² Where the facts stated in the bill show jurisdiction, but those facts are denied, then the objection must be made by plea. (This subject will be considered later.)

965. DEMURRER ON ACCOUNT OF PARTIES. — If the plaintiff in a bill is incapacitated by law to bring that particular suit, and this incapacity appears in the bill, the objection should be taken by demurrer.³ Thus, for instance, if a married woman or an infant should sue alone, not joining a "next friend" as plaintiff, the bill would be demurrable. If, however, the bill does not show that the plaintiff is a married woman or an infant, the objection must be taken by plea averring the fact of coverture or infancy. And this illustrates what I have said before, that a demurrer cannot be aided by any extrinsic fact not stated in the bill.

So, also, if an executor or administrator appointed in one State should bring a suit in another, the bill would be demurrable, because he has no right to bring suit outside of the State where he was appointed, unless he is reappointed in the new forum.

If there has been an omission of any party necessary as plaintiff or defendant, or if there has been any misjoinder by uniting as plaintiff or defendant one who is not a proper party, in each case the correct mode of raising the objection is by demurrer, provided that the error is apparent on the face of the bill.⁴ But, as we have seen already, if a necessary party is absent, the court itself will take notice of the defect and will refuse to pass any decree affecting him, and if necessary will dismiss the bill.

¹ [Story's Eq. Pl. § 490 *et seq.*]

² [Dodge v. Perkins, 4 Mason, 435.]

³ [1 Daniell's Ch. Pr. 287.]

⁴ [Lyman v. Bonney, 101 Mass. 562; Robinson v. Smith, 3 Paige,

222. The demurrer must indicate the parties omitted: *Dwight v. Central Vermont R. R. Co.* 9 Fed. Rep. 785; *Chambers v. Wright*, 52 Ala. 444. See, also, *Case v. Minot*, 158 Mass. 577, 588.]

966. DEMURRERS TO THE FORM OF THE BILL. — The principal formal objection to a bill besides those objections arising out of the non-joinder or misjoinder of parties is that of multifariousness, which has already been considered. Another ground of formal objection would be that the bill was not signed by counsel.

967. DEMURRER TO THE SUBSTANCE OF THE BILL. The principal grounds of demurrer under this head are the following: —

(1) That the bill shows that the plaintiff has a sufficient remedy at law, and therefore there is no jurisdiction in equity.¹

(2) That the plaintiff shows no title whatever for relief.²

(3) That the bill states no cause for liability on the part of the defendant.³

(4) That the plaintiff's title is void under the statute of frauds.⁴

(5) That the statute of limitations is a bar to the bill.⁵

(6) That the gross laches of the plaintiff in bringing suit or making his claim is a bar to the bill.⁶

968. To a bill for discovery simply, the principal grounds of demurrer (as we have seen already⁷) are as follows: —

(1) That the plaintiff shows no title.

(2) That the bill does not show that there is any suit pending, or about to be brought, in which the discovery is material.

(3) That the discovery sought relates exclusively to the defendant's title or case.

(4) That the facts sought to be discovered are not material or competent evidence in the main suit.

(5) That the discovery seeks the disclosure of confiden-

¹ [Aholtz v. Goltra, 114 Ill. 241; Smith v. Chosen Freeholders, 48 N. J. Eq. 627. See, also, *supra*, p. 56.]

² [King of Spain v. Machado, 4 Russ. 225; Oakey v. Bend, 3 Edw. Ch. 482.]

³ [Crane v. Deming, 7 Conn. 387.]

⁴ [Chambers v. Lecompte, 9 Mo. 566.]

⁵ [Wisner v. Barnet, 4 Wash. 631.]

⁶ [Maxwell v. Kennedy, 8 How. 210; Hinchman v. Kelley, 54 Fed. Rep. 63.]

⁷ [See *supra*, p. 474, for cases under this head.]

tial communications, or of facts tending to criminate the defendant, or seeks to expose him to a penalty or forfeiture.

(6) That the defendant is a mere witness, and not a proper party to the suit.

(7) That the bill is unnecessary, because the plaintiff has a complete remedy at law for discovery by means of interrogatories filed in the original suit at law.

969. Two other important points remain to be stated in reference to a demurrer.

(1) In equity a demurrer lies only to the bill, and never to a plea or answer.

In *Banks v. Manchester*,¹ the plaintiff demurred to the answer, and the court treated the case as if it had been set down for hearing on the bill and answer.

(2) If the demurrer is too broad, *i. e.* if it goes to the whole bill, and part of the bill is good, a part only being bad and demurrable, the whole demurrer is overruled. This is the invariable rule.²

The proper practice is to demur separately to the different parts of the bill.

970. A demurrer must always be accompanied by a certificate of counsel stating that in his opinion it is well founded in law, and that it is not intended for delay.³ But in the United States courts the statement as to delay is made, not by counsel, but by the defendant, and in the form of an affidavit.⁴

If a demurrer is overruled, the defendant is then allowed to plead or answer to the bill. If it is sustained, the plaintiff is commonly permitted to amend his bill, if it is amendable; but if the difficulty is one which cannot be cured by an amendment, the bill must be dismissed.

¹ 128 U. S. 244. [See, also, *Crouch v. Kerr*, 38 Fed. Rep. 549; *Travers v. Ross*, 14 N. J. Eq. 254. 409.]

² [Gay v. Skeen, 36 W. Va. 582; *Godwin v. Whitehead*, 95 Ala. 409.]

³ The rule is apparently otherwise in some of the state courts. See *Henley v. Henley*, 93 Mo. 95; *Corpening v. Worthington* (Ala.), 12 So. Rep. 422.]

⁴ Massachusetts Pub. Stats. ch. 151, § 10. ["Merely for delay" is the language of the Practice Act, Mass. Pub. Stats. ch. 167, § 12.]

⁵ Equity Rules, No. 31.

971. DEMURRER ORE TENUS. — When a demurrer has properly been filed, the defendant may at the hearing orally assign new causes for demurrer besides those stated in the written demurrer, and this is called demurring *ore tenus*.¹

Such oral demurrer may prevail, although the other is overruled.²

Three rules govern this subject: (1) A demurrer *ore tenus* is never allowed unless a written demurrer has been filed and is on record; (2) The demurrer *ore tenus* must be coextensive with the demurrer of record; that is, it must apply to the same portions of the bill. If the original demurrer goes to the whole bill, so must the demurrer *ore tenus*, and if the original demurrer was confined to certain parts of the bill, the demurrer *ore tenus* must equally be limited; ³ (3) A demurrer *ore tenus* will not be permitted if a plea has been filed and disallowed.⁴

Pleas.

972. Demurrers raise a question of law. Pleas raise a question of fact. The office of a plea is to present a simple issue of fact which operates as a bar to the plaintiff's right of recovery. The fact put in issue by the plea constitutes in itself a complete defence to the bill, or to that part of the bill to which it is pleaded. The advantage of a plea, if sustained, is that it relieves the defendant from making a full answer to the bill, and hence from making the discovery which the bill calls upon him to make.

The defence to a bill, as will easily be conceived, may take either one of two different forms: it may consist in the denial of the existence of some one fundamental fact without which the plaintiff cannot maintain his bill, although all the other allegations in it may be true, as a denial of the plain-

¹ [Stein v. Benedict, 83 Wis. 603.] Barrett v. Doughty, 25 N. J. Eq. 379.]

² Wright v. Dame, 1 Met. 237; [Vanhorn v. Dnckworth, 7 Ired. Eq. (N. C.) 261.] ⁴ 1 Daniell's Ch. Pr. 588; Story's Eq. Pl. § 464. This rule was departed from in Crease v. Babcock, 2 Met. 525, 531. See, also,

³ [Equitable Life Assurance Society v. Patterson, 1 Fed. Rep. 126; Ward v. Sittingbourne, &c. Ry. Co. L. R. 9 Ch. App. 488.]

tiff's title; or the defence may consist in some extraneous fact, not referred to in the bill, which constitutes in itself a complete answer to the plaintiff's case by way of confession and avoidance.¹

973. Hence pleas are divided into two classes: pure pleas, and anomalous or negative pleas. A pure plea is one which sets up some extraneous fact as a defence to the bill, by way of confession and avoidance, as, for instance, a plea that the plaintiff has given a release of his claim.

A negative or anomalous plea is one which negatives or denies some essential fact stated in the bill, without which the bill cannot be maintained; and therefore, by denying the existence of such fact, the plea raises a complete defence to the whole suit.² Thus, where a bill is brought by one as heir, a plea denying that the plaintiff is heir is a negative plea. At the same time it presents, as I have said, a complete defence to the bill, because, if the plaintiff is not the heir, then he has no title upon which to support his bill, and it is unnecessary to inquire further. Another instance of a negative or anomalous plea would be one denying the partnership which the plaintiff alleged to exist between the defendant and himself as the ground of his bill.

974. Every plea, whether pure or negative, must present but one issue of fact. If it raises two or more issues, it is tainted with duplicity and is fatally defective.³

Thus the statute of limitations and a release (or accord and satisfaction) constitute two distinct defences, which cannot be joined in the same plea.

Nor, as a rule, will several distinct pleas, raising as many distinct issues, be allowed in equity, though this is permissible at law. In such a case the defendant should present his several defences by answer to the whole bill. In some instances, however, several pleas have been allowed,

¹ [Gardner v. Watson, 18 Brad. (Ill.) 28; Gilder v. Gilder, 1 Del. (Ill.) 386.] Ch. 331.]

² [Farley v. Kittson, 120 U. S. 303, 314; United States v. California & Oregon Land Co. 148 U. S. 31; Dodge v. Perkins, 4 Mason, 435; Spangler v. Spangler, 19 Brad. ³ Rhode Island v. Massachusetts, 14 Peters, 210, 259; Story's Eq. Pl. § 654; [McCloskey v. Barr, 38 Fed. Rep. 165; Didier v. Davison, 10 Paige, 515.]

but special leave of the court is necessary for filing more than one plea in equity.

975. There are three cases in which a plea must be accompanied by an answer supporting the plea, and each case depends on the frame of the bill.¹

(1) The first is the case of a pure plea, as where the plea sets up a release. If the plaintiff anticipates this defence in his bill, and avers that the release was obtained from him by fraud, and sets out the facts tending to prove such fraud, and asks for discovery as to them, the defendant, if he pleads the release, should also in his plea deny the fraud;² and he will then be bound to answer fully as to the facts charged in the bill in support of the fraud, — not, it will be observed, in support of the plaintiff's original case, but of the alleged fraud in obtaining the release.³ Were it otherwise, a defendant, by merely pleading a fraudulent release, could shut out a plaintiff from all discovery of the facts showing the defendant's fraud in obtaining the release. The same is true of any other ground set up in the bill by way of defeating an anticipated defence.⁴

(2) Next is the case of a negative plea. If, for example, the bill proceeds upon the title of the plaintiff as heir at law or as a partner, and for evidence of such title sets forth certain facts as being within the defendant's knowledge, the defendant's plea, which denies the existence of the plaintiff's title as heir or partner, must be accompanied by an answer as to those facts and circumstances which are alleged to be within his knowledge, and which he is called upon to discover. In other words, whenever the bill, by way of proving the plaintiff's title, sets forth any facts or circumstances as being within the defendant's knowledge, a plea denying the title must be accompanied by an answer and discovery as to such facts and circumstances.

¹ [The answer overrules the plea when both cover the same parts of the bill: *Stearns v. Page*, 1 Story's R. 204; *Grant v. Phoenix Life Insurance Co.* 121 U. S. 105.]

² [*Foster v. Foster*, 51 Vt. 216.]

³ [*Chapin v. Coleman*, 11 Pick. 331.]

⁴ [*Goodrich v. Pendleton*, 3 Johns. Ch. 384; *Bloodgood v. Kane*, 8 Cowen, 360.]

(3) It is a rule, perhaps a universal one, that, whenever a bill specifically charges fraud or conspiracy, a plea to that part of the bill must be accompanied by an answer explicitly denying the fraud or conspiracy, and the facts upon which the charge is founded.¹

976. Formerly, if an answer accompanying a plea was too broad, — that is, if it included an answer to any portion of the bill to which the plea did not apply, — the plea was made thereby fatally defective, and was overruled. But now, according to the common practice, no plea is held bad because the answer accompanying it covers more of the bill than the plea does.

A plea like a demurrer or an answer may be to the whole of a bill, or only to part of it. But in the nature of things the cases are comparatively few where a plea can apply to a part and not to the whole of a bill. Such a case arises when the claim of the plaintiff is divisible in its nature, and one part of it is open to some special defence which does not apply to the rest.

977. A plea in equity is not demurrable. If the plaintiff thinks it is not good in law, he sets the case down for hearing on the sufficiency of the plea. If the plea is adjudged good, the plaintiff must then take issue upon the plea and the question of fact will be tried. If the plea is adjudged bad, the defendant will be allowed to make answer to the bill.² If the plaintiff takes issue on the plea, he admits its sufficiency in law as an answer to his bill, and the only question open is, whether or not the plea is true in fact.³

It remains to state the chief cases in which a plea is proper. Pleas may be made to the jurisdiction, to the person of either party, or to the substance of the bill. Objections to the mere frame of the bill are taken more properly by demurrer.

978. PLEA TO THE JURISDICTION. — A plea proper lies to the jurisdiction when the defect of jurisdiction depends

¹ See the United States Supreme Court Rules in Equity, No. 32. Rep. 247; Rhode Island *v.* Massachusetts, 14 Peters, 210, 257.

² Nougé *v.* Clapp, 101 U. S. 551; ³ Bean *v.* Clark, 30 Fed. Rep. Armengaud *v.* Coudert, 27 Fed. 225.

upon some fact not stated in the bill. If the defect appears upon the face of the bill, it is then demurrable. The following is an example: The circuit courts of the United States do not, as a rule, have jurisdiction of suits between citizens of the same State. Now, if a citizen of Massachusetts, averring himself to be a citizen of New York, brings suit in a circuit court against another citizen of Massachusetts, a plea will be necessary averring as a fact that the plaintiff was not a citizen of New York, but of Massachusetts, and so that the court had no jurisdiction. This objection must be taken by plea, and not by a motion and affidavits.¹

979. PLEAS TO THE PERSON OF PLAINTIFF OR DEFENDANT. — When the incapacity of the plaintiff or defendant to sue or be sued is apparent on the bill, the proper mode of objecting is by demurrer; but when it does not thus appear, the objection must be presented by plea. Thus, if a female plaintiff sues in her own name as single, when she is in fact a married woman, this fact must be shown by plea, and the objection must be taken in that mode.² The rule is the same in respect to an infant or any one asserting that he acts in a representative capacity which does not really belong to him.³

980. PLEA TO THE SUBSTANCE OF THE BILL. — The following are the principal defences properly made by plea under this head:—

(1) A denial of the plaintiff's title, as, for instance, a denial that he is heir, or devisee, or purchaser.

(2) A denial of the relation on which the bill is founded, as that the defendant is a copartner or trustee, in respect to the plaintiff.

(3) The statute of frauds, the statute of limitations, the

¹ *Pond v. Vermont Valley R. R. Co.* 12 Blatchf. 280, 296; [*Livingston v. Story*, 11 Pet. 351, 393; *Bank of Bellows Falls v. Rutland, &c.* R. R. 28 Vt. 470.]

² [The objection of insanity must be taken by plea: *Hoyt v. Hoyt*, 58 Vt. 538.]

³ [These matters of disability must be set up in separate pleas, if pleaded with other defences, they will be deemed to be waived: *Oregonian Railway Co. v. Oregon Railway & Navigation Co.* 27 Fed. Rep. 277.]

laches of the plaintiff. But when these objections are apparent on the face of the bill, they must be availed of by demurrer, not by plea.

(4) Payment, release, or any other similar defence which is in the nature of confession and avoidance.

(5) That defendant is a *bonâ fide* purchaser for value without notice of plaintiff's claim.

If the plaintiff in his bill has anticipated this last-mentioned defence, and has charged that the defendant had notice, setting forth the facts upon which he relies as evidence of such notice, the defendant's plea must be supported by an answer to that part of the bill, fully answering as to the facts upon which the plaintiff charges him with notice.

It was formerly held that this defence of *bonâ fide* purchaser must be set up by plea and not by answer, and that, if it was not pleaded, the defence was waived and the defendant was bound to answer fully. But now, in England, in the courts of the United States, in Massachusetts (and I believe in other States), the defence that the defendant is a purchaser for value without notice may be set up in the answer. This is by virtue of the rule now adopted in those courts, that a defendant may avail himself in his answer of any matter in bar which he could plead in bar; and the case of a *bonâ fide* purchaser is put by way of illustration.¹ (Equity Rules of the United States Supreme Court, No. 39.)

Answer.

981. The third mode of defence to a bill is by answer. If the defendant does not demur or plead to the bill, he must answer, except in a few special cases where a disclaimer may be filed.

An answer is, or may be, twofold in its nature: (1) It is strictly a disclosure, *i. e.* an admission or denial of the several matters set forth in the plaintiff's bill; (2) It introduces and sets forth new matter constituting a special defence to

¹ In Massachusetts, by Equity Rule No. 13, it is provided that "the defendant, instead of filing a formal plea or demurrer, may insist on any special matter in his answer, and have the same benefit therefrom as if he had pleaded the same or demurred to the bill."

the plaintiff's case. Its first office is either to admit or deny in detail the several allegations stated in the bill; its second office is to set up the *new* matter forming an independent defence to the plaintiff's case.

An answer must be under oath, and ordinarily signed by the defendant.¹ The general rule is, that, if a defendant answers at all, he must answer "fully," that is, he must answer fully and directly to every fact well pleaded in the bill.² He need not notice averments of law.³

Concerning facts which are charged to have been done by him personally or to his personal knowledge, he must answer positively, and not merely as to his remembrance or belief.⁴ As to facts not within his personal knowledge, he must answer as to his information and belief.⁵

It is said, however, that when a defendant distinctly states that he has no personal knowledge or information on the subject in question, he is not required to go further and state as to his belief.⁶

An evasive answer is not only bad pleading,⁷ but very poor policy. If it fails to meet squarely the averments of the bill, it at once excites the distrust of the court.⁸

982. If a bill is filed against two or more, each defendant is bound to answer only as to those matters which are

¹ In Massachusetts the answer may be signed by the defendant or by his counsel, and the oath to the answer is now abolished by statute, "except in cases of bills filed for discovery only:" Acts of 1883, ch. 223, § 10. There is a similar provision in New York. [The answer must be signed by the defendant even though his oath is waived: *Denison v. Bassford*, 7 Paige, 370. But his signature may be waived by the plaintiff, and the filing of a replication is evidence of such waiver: *Fulton Bank v. Peach*, 2 Paige, 307; *Collard v. Smith*, 13 N. J. Eq. 43; *Howes v. Downing*, 72 Mich. 43. The answer must be signed by counsel, and a firm name is sufficient:

Hampton v. Coddington, 28 N. J. Eq. 557.]

² [*Home Insurance Co. v. Myer*, 93 Ill. 271; *Bank of Utica v. Messereau*, 7 Paige, 517. And at the trial the defendant can rely only upon the matters set up in his answer: *Warren v. Warren*, 30 Vt. 530.]

³ [Nor allegations of immaterial facts: *Dinsmoor v. Hazelton*, 22 N. H. 535.]

⁴ *Slater v. Maxwell*, 6 Wall. 268.

⁵ *Story's Eq. Pl.* § 854; [*Devereaux v. Cooper*, 11 Vt. 103.]

⁶ 1 *Daniell's Ch. Pr.* 722, 723, and notes.

⁷ [*Place v. Providence*, 12 R. I. 1.]

⁸ [*Slater v. Maxwell*, *supra*.]

charged against and which concern himself, and not as to those which are applicable merely to another defendant.

If one object of the bill is to obtain an account from the defendant, and the answer denies that the plaintiff is entitled to any account, or if it denies that the defendant is the trustee or agent or copartner of the plaintiff, the answer need not set forth an account until the plaintiff's right to it is established.¹ Otherwise the plaintiff could compel the defendant to make a disclosure of accounts to which he had no right. If the plaintiff's title to an account is made out, then the court orders the defendant to render the account, and the case is commonly referred to a master for that purpose.

983. The answer must not set up two inconsistent and contradictory defences as to matters of fact within the personal knowledge of the defendant. An answer must be ordinarily under oath, and both of two contradictory statements of fact cannot be true. This, however, does not preclude the defendant from setting up alternative defences. An alternative defence is permissible in two cases: (1) The answer may set up two different states of facts, neither of which is within the personal knowledge of the defendant, but as to which he can properly assert, upon information and belief that, if one state of facts does not exist, the other does; (2) The alternative defence may consist in setting up two titles, both held by the defendant, one of which must be valid if the other is not.

984. An answer under oath, so far as it is responsive² to the bill, is evidence for the defendant;³ and it requires the evidence of two witnesses, or of one witness and strong corroborative circumstances⁴ equivalent to one witness, to overcome it, else the answer will prevail.⁵

¹ [This appears to be a disputed point. See Story's Eq. Pl. § 825 *a*, 10th ed. and notes. See, also, *French v. Rainey*, 2 Tenn. Ch. 640.]

² [*Riegel v. Insurance Co.* 153 Pa. St. 134, 143.]

³ [*Blaisdell v. Bowers*, 40 Vt. 126; *Fenno v. Sayre*, 3 Ala. 458.]

⁴ [See *Veile v. Blodgett*, 49 Vt.

270; *Rowley's Appeal*, 115 Pa. St. 150; *Gould v. Williamson*, 21 Me. 273.]

⁵ [*East India Co. v. Donald*, 9 Ves. 275; *Latta v. Kilbourn*, 150 U. S. 524; *Mey v. Gallinau*, 105 Ill. 272; *Feighley v. Feighley*, 7 Md. 537; *Bellows v. Stone*, 18 N. H. 465.]

This is true only so far as the answer is responsive to the allegations of the bill. If the answer sets up any new matter in defence, as for example, a release or payment, or that the defendant is a *bonâ fide* purchaser, the answer as to such matters is no evidence in favor of itself, and they must be proved by independent testimony.¹

So, also, if the answer is evasive or equivocal, or to the effect that the defendant has no personal knowledge or recollection, then only one witness is necessary to maintain the bill.²

It is only when the answer meets the bill by a personal, absolute denial, founded on personal knowledge, that two witnesses or their equivalent are necessary to overcome it. The authorities disagree as to whether a plaintiff may waive the oath of the defendant to his answer without the defendant's consent.³ The better opinion is, I think, that he may do so, and in that case the answer is not evidence for the defendant, and the plaintiff can establish his case by the testimony of a single witness.⁴

985. If there are two or more defendants who have the same title and interest and the same defence, the proper practice is for them to join in one answer, which is commonly entitled as "the joint and several answer" of the defendants. If several answers are filed unnecessarily by each defendant, the court, as a rule, will disallow costs of all the answers but one.

If the interests of the defendants are conflicting, they should file several answers. Infants should answer by guardians *ad litem*.

¹ Story's Eq. Pl. § 849 *a*; [Wells v. Bulkley, 14 N. J. Eq. 294, 306. v. Houston, 37 Vt. 245; Ingersoll v. Stiger, 46 N. J. Eq. 511.] See, also, 1 Daniell's Ch. Pr. 737, notes to 6th Amer. ed. An answer sworn to, though the oath was waived by the plaintiff, is evidence for the defendant on a motion for injunction, if not at final hearing: Walker v. Hill, 21 N. J. Eq. 191; Woodruff v. Dubuque, &c. R. R. 30 Fed. Rep. 91. Admissions in an unsworn answer are still evidence against the defendant: Uhlman v. Arnholt, &c. Brewing Co. 41 Fed. Rep. 369.]

² Slater v. Maxwell, 6 Wall. 268, 275.

³ Story's Eq. Pl. § 875 *a*.

⁴ Patterson v. Gaines, 6 How. 550, 588; Union Bank v. Geary, 5 Peters, 98; Bartlett v. Gale, 4 Paige, 503. [See, also, Hyer v. Little, 20 N. J. Eq. 443; Sweet v. Parker, 22 N. J. Eq. 453. *Contra*: Clements v. Moore, 6 Wall. 299, 314; Amory v. Lawrence, 3 Cliff. 523, 537; Brown

CHAPTER XXXV.

SUPPLEMENTARY PROCEEDINGS.

Insufficient Answer.

986. If a defendant's answer is insufficient, — that is, if it fails to meet fully and distinctly the allegations of the bill, — the plaintiff may except to it for insufficiency.¹ The exceptions must point out specifically wherein the answer is evasive or fails to meet the bill.² These exceptions are filed in the case by the plaintiff, and are either heard by the court itself, or more commonly they are referred to a master in chancery for hearing. He reports his conclusions to the court, and either party may except to the report. If the answer is adjudged insufficient, the defendant is ordered to file an additional answer, and is condemned in costs. If the second answer is insufficient, the bill may be taken *pro confesso* as to those portions of it not properly answered. This is the practice in the Federal courts (United States Rules in Equity, No. 64), and it was formerly the practice in Massachusetts. The present rule in Massachusetts³ is, that the defendant in such a case shall pay double costs, and that he may be examined upon interrogatories, and be committed until he answers them.

Whenever the plaintiff has waived the oath to the answer, no exceptions will lie to its insufficiency.⁴

987. If the answer neither admits nor denies a material

¹ [A demurrer to an answer does not lie; *supra*, p. 558.] Ch. 326; McCormick v. Chamberlin, 11 Paige, 543; Smith v. McDowell, 148 Ill. 51, 61. *Contra*: Reed v. The Cumberland Fire Insurance Co. 36 N. J. Eq. 393, 396. See, also, Denison v. Bassford, 7 Paige, 370.]

² [Arnold v. Slaughter, 36 W. Va. 589.]

³ [Rules in Equity, No. 18. These rules are printed in 136 Mass. 603.]

⁴ [Sheppard v. Akers, 1 Tenn.

allegation in the bill, and the plaintiff fails to except for insufficiency, the plaintiff must prove the allegation by evidence,¹ but the testimony of a single witness will be sufficient for that purpose.²

In Massachusetts, however, by the 28th Equity Rule all allegations in a bill (other than a bill for discovery), not denied or put in issue by the answer, are deemed to be admitted.

When a fact material to the defence has occurred since the filing of the answer, the proper mode of introducing it is by a cross-bill, and not by amendment to the answer. Such a fact would be a release or a discharge in bankruptcy.³

Disclaimer.

988. The remaining mode of defence to a suit in equity is by disclaimer. To all intents and purposes, a disclaimer, so far as it goes, is really in the nature of an answer;⁴ but the distinction between an answer proper and a disclaimer is adopted by writers and courts of the highest authority, and therefore we cannot overlook it.⁵

A disclaimer is the proper mode of defence whenever a party is joined as a defendant who makes no claim whatever to the subject-matter of the suit. Upon filing a disclaimer, the defendant is ordinarily relieved from making any further answer or discovery to the plaintiff's bill. He should be dismissed from the suit as a party, and if there are any facts within his knowledge which the plaintiff wishes to have produced, he may examine him as a witness.

But the exceptions to this rule are more numerous than

¹ [Cushman v. Bonfield, 139 Ill. 219.]

² [Brown v. Pierce, 7 Wall. 205, 211; Rogers v. Marshall, 13 Fed. Rep. 59.]

³ Story's Eq. Pl. §§ 393, 903; Banque Franco - Egyptienne v. Brown, 24 Fed. Rep. 106; Taylor v. Titus, 2 Edw. Ch. 135, *supra*, p. 537.

⁴ [A disclaimer must be signed

by the defendant and witnessed; but in this country it need not be under oath, nor signed by counsel: Dickerson v. Hodges, 43 N. J. Eq. 45.]

⁵ In Massachusetts the Public Statutes (ch. 151, § 10) provide that "a defence in equity shall be made by demurrer, plea, or answer," excluding disclaimer.

the cases under the rule itself. The only instance in which a disclaimer will be sufficient is where the defendant has no interest, and has never claimed any, in the subject-matter of the suit; and where the bill charges him with no misconduct or liability in reference to the subject-matter of the suit.

Although the defendant has no present interest in the property, yet, if he formerly asserted such an interest, then in addition to a mere disclaimer, he must so far answer the bill as to state to whom and when he conveyed his interest, so that the plaintiff may know whom to make the proper party defendant in his place.¹

989. Again, although the defendant has no interest in the property or subject-matter of the suit, yet if the bill avers that he has pretended or pretends to make claim to it, or has improperly mixed himself up in the transaction, then a mere disclaimer will not do, — he must answer the specific charges in the bill. An instance is found in the case of *Graham v. Coape*,² where the bill was brought against trustees holding a fund to which the plaintiff was entitled. The bill also joined as defendants two other persons, averring that they had claimed the fund, and had called upon the trustees to pay it to them. The court held that a simple disclaimer by these other defendants was insufficient, and that they must answer fully the charges in the bill; the reason being that, if the charges were true, the additional defendants were properly joined, and would be liable for costs in spite of their disclaimer.

990. Whenever a party is charged with any liability on account of his personal fraud or misconduct, although he may not have any pecuniary interest himself in the property or transaction in question, a mere disclaimer will not do, but he must answer fully as to the alleged fraud or misconduct. Thus an agent ordinarily is not a proper party to a bill

¹ Story's Eq. Pl. § 838. [Exceptions cannot be taken to a disclaimer. If a disclaimer is improperly filed in place of an answer, the court will order it to be taken from the files: *Isham v. Miller*, 44 N. J. Eq. 61, 63. When the disclaimer is accompanied by an insufficient answer, the proper course is to except to the answer: *Ellsworth v. Curtis*, 10 Paige, 105.]

² 3 Myl. & Cr. 638. [See, also, *Isham v. Miller*, *supra*; *Bromberg v. Heyer*, 69 Ala. 22.]

brought against his principal, although the business was transacted by the agent for his principal, and in such case a disclaimer by the agent would be a proper mode of defence. But if the bill charges fraud in the transaction, and charges that the agent participated in or conducted the fraud ; then, although the agent may have had no pecuniary interest in the subject-matter, yet, as in cases of fraud all are principals and all participating in it are liable to the plaintiff, the agent must answer fully as to his alleged fraud or misconduct.¹

The practical result is that there is only one instance, and that a very narrow one, in which it will be safe to stand upon a mere disclaimer, namely, where the bill is brought against a party who has no interest in the subject-matter, who has never previously claimed any, and against whom no charge of personal fraud or misconduct is made in the bill.²

Case on Bill and Answer.

991. Upon the filing of an answer the plaintiff must do one of two things, — either set down the case for hearing upon the bill and answer, or else take issue upon the answer.

SETTING DOWN THE CASE. — If the plaintiff is satisfied that, admitting the answer to be true, it constitutes in law no defence to the bill, one course open to him is to set down the case for hearing upon the bill and answer.

A demurrer never lies to an answer in equity ;³ but this proceeding is in effect equivalent to a demurrer to the answer. It is proper in two cases : (1) Where the answer simply admits all the material allegations of the bill and sets up no new matter : then arises the simple question whether the bill, taking it to be true, states a case for equitable relief. (2) Where the answer sets up new matter, but such new matter constitutes no defence in law to the case stated in the bill and admitted in the answer.

¹ Story's Eq. Pl. § 838.

² [A disclaimer operates like a release : *Dickerson v. Hodges*, 43 N. J. Eq. 45. And one who has dis-

claimed is estopped from claiming the property afterward : *Hansell v. Hansell*, 44 La. Ann. 548, 553.]

³ [See p. 558, *supra*.]

992. All new matter in the answer must be taken as true when the case is set down for hearing upon the bill and answer.¹

It is dangerous, however, to set down a case for hearing on bill and answer when the answer introduces new matter, unless the plaintiff intends never to contest its truth; because, if it should be held upon the hearing that the answer constitutes a defence, that decision is conclusive upon the plaintiff, and a decree dismissing the bill follows. It would be only under most extraordinary circumstances of misapprehension or mistake that, after such a hearing and decision, the court would allow the plaintiff to take issue upon the answer.²

993. REPLICATION.—The second mode of meeting the answer is by filing a general replication thereto. This puts in issue all the facts set forth in the bill and not admitted in the answer.

The replication must be general. A special replication, *i. e.* one setting up some new fact in reply to the answer, is seldom if ever allowed. If such new fact becomes necessary, the ordinary way is to introduce it in the bill by amendment.³

When the replication has been filed the pleadings are closed; the cause is at issue, and the time for taking testimony has arrived. Before considering this matter, however, I shall briefly notice one or two points of practice.

Amendments.

994. The power of the court to allow amendments at any stage of the cause is undoubted, and it is exercised with great liberality.⁴ The rules upon this subject may be summed up as follows:—

¹ *Banks v. Manchester*, 128 U. S. 244; *Reynolds v. Crawfordville Bank*, 112 U. S. 405, 409; *American Carpet Lining Co. v. Chipman*, 146 Mass. 385; [*Atkinson v. Manks*, 1 Cowen, 691; *Doremus v. Cameron*, 49 N. J. Eq. 1; *Mazet v. Pittsburgh*, 137 Pa. St. 548.]

² *Bullinger v. Mackey*, 14 Blatchf. 355.

³ [*White v. Morrison*, 11 Ill. 361.]

⁴ [*Perry v. Perry*, 65 Me. 399, 402; *Foster v. Knowles*, 42 N. J. Eq. 226.]

(1) All merely formal amendments will be permitted at any time before final decree. Such formal amendments are the insertion and correction of names and dates and other similar omissions and errors.

(2) Before any pleading is made to the bill, material amendments in substance will be allowed as a matter of course.

(3) After hearing, and even after an interlocutory decree, amendments will be allowed to make the pleadings conform to the case which the parties intended to present, and which has in fact been heard.¹

So, where the plaintiff had neglected to file a replication, but the case had proceeded to a hearing as if one had been filed, the court disregarded the omission and ordered the replication to be filed *nunc pro tunc*.

(4) But a party under the guise of an amendment will not be allowed to present a new case different from that stated originally. The court will help by amendment a defective statement, but it will not permit a plaintiff to change his ground, and, under the pretence of amendment, to state a new case.²

(5) An amendment to a sworn answer will not be allowed, except upon clear proof of mistake or accidental omission.³

Bill Pro Confesso.

995. If a defendant omits to demur, plead, or answer to a bill within the time prescribed by the rules, or within such extended time as may be granted by the court, a decree will be entered as of course, on motion of the plaintiff that the bill be taken as confessed by the defendants.

The effect of such a decree is, that every allegation of fact well pleaded in the bill is thereafter to be taken as true as against the defendant.

¹ Thompson v. Maxwell, 95 U.S. 391, 401; Neale v. Neales, 9 Wall. 1. In Tremaine v. Hitchcock, 23 Wall. 518, an amendment was allowed after final decree; [Byers v. Franklin Coal Co. 106 Mass. 131; Dodson v. McKelvey, 93 Mich. 263.]

² Shields v. Barrow, 17 How. 130, 144; [Jones v. Davenport, 45 N. J. Eq. 77.]

³ [When a bill has been sworn to unnecessarily, it may be amended as if it were not under oath: Campbell v. Powers, 139 Ill. 128.]

If, from the nature of the case, no further inquiry or proceedings are necessary in order to determine the final relief which the plaintiff is entitled to, then a decree for such final relief will follow. For example, if the bill is brought for the specific performance of an agreement to sell land, and a decree *pro confesso* is entered, the whole case for relief is made out, and nothing remains to be done to entitle the plaintiff to a decree requiring the defendant to make the transfer.

But if the bill is brought by a *cestui que trust* against an alleged trustee, or by a principal against his agent for an account, and the bill is taken *pro confesso*, the title of the plaintiff and his right to an account are thereby established, but he does not thereby obtain the account which he seeks. There must be further proceedings, namely, an order on the defendant to account; the taking of the account; and the ascertainment of the amount due, and a final decree for its payment accordingly.¹ Now, in these necessary proceedings subsequent to the decree *pro confesso*, the defendant must appear and render his account, or be adjudged guilty of contempt. But in none of these subsequent proceedings can he contest the truth of any well-pleaded allegation of fact in the bill. And in the accounting he has no right to appear and be heard before the master without special order and leave of the court.²

Testimony in Chancery.

996. After a cause is at issue, either on bill and plea, or upon bill, answer, and replication, the next step is the taking of the testimony.

Strictly, all testimony in a chancery suit is taken by deposition. Witnesses are never examined orally in the presence of the court, as in a court of law. By a standing rule, the time is fixed, after the cause is at issue, within which the parties are to take their testimony.

The testimony is taken before a master or commissioner, upon written interrogatories and cross-interrogatories previ-

¹ [Blanchard v. Cooke, 144 Mass. 207.]

² McMicken v. Perin, 18 Howard, 507.

ously filed by the parties, and the testimony thus taken must be filed in the clerk's office before the day of "publication." "Publication" is the opening of the depositions, and until then neither party is at liberty to see the testimony which has been taken. It is upon this written testimony that the cause is heard by the judge or chancellor.

Such was the original chancery practice, and it is now substantially pursued in the courts of the United States, with some modifications as to the manner of taking the testimony. Witnesses are not orally examined in presence of the court, but all the testimony in the case is taken by depositions, or by examiners appointed by the court. When the evidence is taken before an examiner, both parties may attend, and they may be represented by counsel. The evidence is reduced to writing, and each side is permitted to cross-examine the witnesses produced by its opponents. The examiners have no power to pass upon the admissibility of evidence. Any evidence which is offered must be received, subject to the objections of the other side, which are noted by the examiner, and passed upon by the court at final hearing. The testimony thus taken is filed in the clerk's office and subsequently printed, and no other testimony is admissible at the hearing. In the Federal courts three months are allowed for taking testimony after the cause is at issue; but this time may be extended by agreement of counsel, or by the court upon motion.

997. In *Blease v. Garlington*¹ the Supreme Court declined to decide whether the circuit courts of the United States have power to hear oral testimony in chancery suits, but they decided that these courts are not bound to do so, and further that, if such testimony is received by them, it should be taken down in writing and made a part of the record, so as to go up on appeal.

998. In Massachusetts the old chancery rule is entirely departed from, and it is provided by statute that evidence in equity "shall be taken in the same manner as in suits at law."² All hearings upon issues of fact must occur, in the first place, before a single judge. The witnesses are

¹ 92 U. S. 1.

² Pub. Stats. ch. 169, § 66.

examined orally, and at the request of either party the judge appoints a commissioner to take down the testimony.¹ An appeal lies from the decision of a single judge to the full bench; and therefore, if either party anticipates the possibility of an appeal, the evidence should be taken down by a commissioner, so as to be reported to the full court. There can be no appeal as to any finding of fact unless the testimony is thus taken and reported. Without it the only question open on appeal is whether, as matter of law, the bill or answer, as the case may be, supposing it to be true, justifies the decree of the single judge.²

Objections to the testimony at the hearing should be noted, so that on appeal they may be open to the objecting party.

The decision of a single judge upon questions of fact is practically conclusive. The full court will not overrule his finding unless a clear case of mistake upon the evidence is made out.³

Having heard the case, the single judge renders his decree; and from that decree an appeal lies to the full bench in Massachusetts, and in the United States Circuit or District Court, to the United States Supreme Court⁴ in proper cases.

Masters in Chancery.

999. After a cause has been opened before a judge, and before it has been heard fully, or after it has been heard by him so far as to determine that the plaintiff's title is established, the case is frequently referred to a master for further proceedings.

A master in chancery is an officer of the court, to whom the court may refer any matter of inquiry during the progress of a cause, and thereupon it becomes the duty of the master to investigate the matter referred to him, to hear the parties thereon, and to make his report to the court.

¹ Massachusetts Equity Rules, No. 35.

² *Iasigi v. Chicago, B. & Q. R. R.* 129 Mass. 46; *O'Hare v. Downing*, 130 Mass. 16; *Weld v. Walker*, 130 Mass. 422.

³ [*Jenkins v. Cohen*, 138 Ill. 634; *Fletcher v. Bartlett*, 157 Mass. 113.]

⁴ [Or, at present, to the new Circuit Court of Appeals, in certain cases.]

Masters in chancery for the state courts are appointed, as a rule, by the governor. In the Federal courts these officers are appointed by the courts themselves. Special masters, that is, masters for a particular case, may be appointed by any court of equity. When a case presents various and complicated questions of fact, the court often refers it to a master to take the testimony, make his findings as to the facts, and report his conclusions, with the testimony, to the court.

Whenever a case requires or calls for an account, the accounting is universally referred to a master, and this is his chief duty. And generally, when any question arises in a case as to the amount which should be decreed to either party, that question is in the first place referred to a master for his examination and report.

In matters of account, the parties themselves may always be examined by the other side before the master. Witnesses may be examined orally, and the master is at liberty to receive any competent evidence. All the testimony already taken in the case is before him.

Hearings before a Master.

1000. The master, having heard the parties, makes a draft of a report which he submits to them. If either party has any objections to the report, they should be made in writing, in the form of exceptions, specifying particularly the matter to which objection is taken.

The master then reconsiders his report, and either modifies it or not, as he sees fit. His report, as finally settled, he returns to the court, and at the request of either party he is also bound to return a report of the testimony taken before him.

If either party is dissatisfied with the report as finally settled, he must file his exceptions thereto before the master, who will include them in his report; and the exceptions should also be filed in the clerk's office by the party taking them, after the master's report has been filed.

In the United States courts no objections are allowed to a master's report unless exceptions to the report were taken and filed before the master, and they must then be filed

again in the clerk's office immediately after the filing of the master's report.¹

The next step in the cause is to set it down for hearing before a single judge upon the exceptions to the master's report. The judge hears the case upon these exceptions, and affirms or modifies or entirely overrules the report, re-commits the case for further hearing, and enters his decree accordingly, and the dissatisfied party has his appeal to the full court.

1001. A master's report is assumed to be correct as to all conclusions of fact, and the court will not overrule it unless it is manifestly wrong, and contrary to the weight of the evidence. All presumptions are made in its favor as to findings of fact; it stands in this respect like the finding of a jury, and the court will require as clear a case of mistake to set it aside as is required to set aside the verdict of a jury.² No exceptions lie to the master's report as to any matters of fact unless the evidence is reported.³

An order to a master should include directions to report the testimony at the request of either party.

A master may act *ex re* when convenience requires it.⁴ So, also, may an examiner.⁵

¹ Story *v.* Livingston, 13 Peters, 359; McMicken *v.* Perin, 18 How. 507. The practice is now substantially the same in Massachusetts. It is carefully defined in Equity Rules, Nos. 31, 32.

² [Fry *v.* Feamster, 36 W. Va. 454.]

³ Carpenter *v.* Cushman, 121 Mass. 265.

⁴ Bate Refrigerating Co. *v.* Gillette, 28 Fed. Rep. 673.

⁵ North Carolina R. R. Co. *v.* Drew, 3 Woods, 691, 697.

CHAPTER XXXVI.

RECEIVERS. — PRACTICE.

1002. A RECEIVER is a person appointed by the court¹ to have the custody and care of property, pending litigation in regard to it. There must be a pending suit, and a receiver is appointed in that suit.²

By his appointment he becomes an officer of the court. The property itself is constructively in the possession of the court, and in the discharge of his duties he is subject to the direction, control, and protection of the court. His authority is derived entirely from the court, and both his powers and duties are prescribed by it.

It is a very high exercise of power for a court of chancery to take property out of the hands of its owner, or of one in possession asserting himself to be its owner, and place it in the custody of a third person. Hence the court will exercise this extreme prerogative only when it is made to appear that the property will probably be wasted, secreted, or misapplied, and that its rightful claimants will thereby be injured or defrauded if it is allowed to remain in its present hands.³

¹ [For the form of an order appointing a receiver, see *Kennedy v. The St. Paul & Pac. R. R. Co.* 2 Dill. 448.]

² [Guy v. Doak, 47 Kan. 236; Myers v. Estell, 48 Miss. 372, 401; The State v. Ross, 122 Mo. 435. A receiver may be discharged in vacation by a judge at chambers: *Walters v. Anglo-American Mortgage & Trust Co.* 50 Fed. Rep. 316; *Crawford v. Ross*, 39 Ga. 44. But he cannot be appointed except in term time, and in open court:

Hervey v. Illinois Midland Ry. Co. 28 Fed. Rep. 169.]

³ [*Crombie v. Order of Solon*, 157 Pa. St. 588; *Mason v. Supreme Court of Equitable League*, 77 Md. 483; *Speights v. Peters*, 9 Gill, 472, 476; *Crawford v. Ross*, 39 Ga. 44; *Fluker v. Emporia City Ry. Co.* 48 Kan. 577. A receiver will not always be appointed simply because the firm or corporation is insolvent: *Lawrence Iron Works v. Rockbridge Co.* 47 Fed. Rep. 755.]

The instances in which a court of chancery will appoint a receiver may be summed up in three general classes,¹ as follows : —

1003. PARTNERSHIPS. — In a suit for dissolution of a partnership, if it appears that neither party as against the other should be intrusted with its assets, or with the control and disposal of them, the court will appoint a receiver with power to collect the assets of the firm, pay its debts, and distribute the remainder among the partners, according as they are entitled to it under the partnership articles.²

To justify the appointment of a receiver in the case of a partnership, it may be said in a general way, that it must appear, either (1) That one partner is acting in fraudulent or wilful violation of the partnership agreement; or (2) is excluding his copartner from his proper share in the management of the partnership assets and business; or (3) is acting dishonestly; or (4) that the hostility between the partners and their loss of confidence in each other are so great, or their views and interests are so conflicting, that all co-operation and reasonable settlement of their affairs by themselves have become impracticable.

1004. RAILROAD CORPORATIONS. — The construction of railroads, especially at the West, on borrowed capital, secured by bonds and mortgages on the road itself, has been so common, and the failures to pay interest and principal on the bonds have also been so common, that the appointment of receivers of railroads has become a very important part of the duties of courts of chancery.

¹ [Cases in which a receiver of trust property was appointed, at the suit of the *cestui que trust*, are : Hagenbeck v. Hagenbeck Zoölogical Arena Co. 59 Fed. Rep. 14; Ames Iron Works v. West, 24 Fed. Rep. 13.]

² [Pini v. Roncoroni, [1892] 1 Ch. 633; Williamson v. Wilson, 1 Bland, 418; Sutro v. Wagner, 23 N. J. Eq. 388; Jordan v. Miller, 75 Va. 442; Saylor v. Mockbie, 9 Iowa, 209; Barnes v. Jones, 91 Ind. 161; Boyce

v. Burchard, 21 Ga. 74; Whitman v. Robinson, 21 Md. 30; New v. Wright, 44 Miss. 202, 211. In the following cases it was held that the circumstances did not justify the appointment of a receiver : Harding v. Glover, 18 Ves. 281; Roberts v. Eberhardt, Kay, 148; Buckeye Engine Co. v. Donau Brewing Co. 47 Fed. Rep. 6; Henn v. Walsh, 2 Edw. Ch. 129; Moies v. O'Neill, 23 N. J. Eq. 207.]

When default has been made by a railroad company in payment of principal and interest, and it is made to appear that the company is insolvent, or that the property mortgaged is inadequate to secure the debt, or that the interests of the creditors will be put in jeopardy if the corporation is permitted to remain in the possession and management of its road, the court will appoint a receiver.¹

In such cases the duties of the receiver are commonly not merely passive, but active. He is not merely in possession of the property as its custodian: it is also his duty to operate the road as a railroad, as a "going concern;" to conduct its business, pay expenses, and from the net receipts pay the mortgage debt so far as possible. In this emergency courts of chancery to a certain extent must undertake the business of operating railroads, because the receiver acts exclusively under their direction and control. Of course, within certain limits, matters are necessarily left to his discretion; but the court determines whether the railroad shall or shall not be operated by the receiver, and its sanction must be obtained to any contracts affecting the position or property of the company.² If the receiver is authorized to operate the road, he becomes a common carrier to that extent, with authority to make the ordinary contracts of a carrier.³

¹ [Pennsylvania Co. v. Jacksonville Co. 55 Fed. Rep. 131; Putnam v. Jacksonville Co. 61 Fed. Rep. 440; Kelly v. Trustees of the Alabama, &c. R. R. Co. 58 Ala. 489; Mercantile Trust Co. v. Missouri, K. & T. Ry. Co. 36 Fed. Rep. 221; Farmers' Loan & Trust Co. v. Winona, &c. Ry. Co. 59 Fed. Rep. 957. In Williamson v. The New Albany, &c. R. R. Co. 1 Biss. 198, the court refused to appoint a receiver. An officer of the company may be appointed receiver: Farmers' Loan & Trust Co. v. Northern Pacific Ry. Co. 61 Fed. Rep. 546; Fowler v. Jarvis-Conklin Mortgage Co. 63 Fed. Rep. 888. *Contra*, except under very special circumstances: Finance Co. v. Charles-

ton, &c. R. R. Co. 45 Fed. Rep. 436.]

² [The Lehigh Coal, &c. Co. v. The Central Railroad of New Jersey, 35 N. J. Eq. 426; The Vermont & Canada R. R. v. The Vermont Central R. R. 46 Vt. 792.]

³ [Cowdrey v. The Railroad Co. 1 Woods, 331. As to a receiver's right to raise or reduce wages, see Ames v. Union Pacific Ry. Co. 62 Fed. Rep. 7; s. c. 60 Fed. Rep. 674; Thomas v. Cincinnati, &c. Ry. Co. 62 Fed. Rep. 17; Continental Trust Co. v. Toledo, St. L. &c. R. R. Co. 59 Fed. Rep. 514; United States Trust Co. v. Omaha & St. L. Ry. Co. 63 Fed. Rep. 737. The court may order wages to be

1005. Moreover, a receiver of a railroad or other corporation may be appointed not only in behalf of mortgagees or other creditors, but also in behalf of its own stockholders. Whenever a controversy arises between the stockholders themselves, and it is made to appear that the directors, or a majority of the stockholders, are conspiring to act unlawfully, or against the rights of the minority, the court will appoint a receiver to take possession of the property, if it is satisfied that such a course is necessary for the protection of the minority, until the questions at issue may definitely be settled.¹

1006. CORPORATIONS IN GENERAL. — A receiver will not be appointed in the case of a corporation, unless the emergency demands such an appointment, for this course often operates as a dissolution.²

Upon the dissolution of a corporation, the court will appoint a receiver to wind up its affairs, whenever this is necessary for the protection of creditors or shareholders and the winding-up process cannot safely be intrusted to its officers.³

Certain corporations become sources of public danger if they are insolvent, and therefore it is important that they should not be allowed to continue business in that condition. To prevent this, courts of chancery will appoint receivers to take possession of their assets and wind up their affairs. This is particularly true of national banks,⁴ of savings banks, and of insurance companies.

In Massachusetts the Supreme Judicial Court is author-

paid to a faithful employee who has been disabled in the course of his duty, although there is no legal liability for his injury: *Thomas v. East Tenn. & Ry. Co.* 60 Fed. Rep. 7.]

¹ High on Receivers, § 366. [In *Stevens v. Davison*, 18 Gratt. 819, a receiver was appointed to protect the stockholders from the action of the directors.]

² [*Ranger v. Champion Cotton-Press Co.* 52 Fed. Rep. 609; *Ellerman v. Chicago Junction Railways*,

49 N. J. Eq. 217; *Fluker v. Emporia City Ry. Co.* 48 Kan. 577; *Baltimore & Ohio R. R. v. Cannon*, 72 Md. 493. See, also, *Featherstone v. Cooke*, L. R. 16 Eq. 298; *Edison v. Edison United Phonograph Co.* 52 N. J. Eq. —.]

³ [Supreme Sitting of the Order of the Iron Hall *v. Baker*, 134 Ind. 293; *Ettlinger v. Persian Rug & Carpet Co.* 66 Hun, 94.]

⁴ See U. S. Rev. Stats. § 5234, *et seq.*

ized by statute to appoint receivers in the following cases : Dissolution of corporations generally ; ¹ banking companies ; ² savings banks ; ³ insurance companies ; ⁴ partners, joint tenants, and tenants in common.⁵

1007. AT THE SUIT OF JUDGMENT CREDITORS. — The court will ordinarily appoint a receiver of a debtor's property at the suit of a judgment creditor, when the property is of such a nature that it cannot be taken on execution at law.⁶ In such cases a receiver will be appointed (1) when there is any danger that the equitable assets will be misapplied by the debtor if they are left in his control ;⁷ (2) when the nature of the property is such that a receiver is necessary in order to collect and apply the proceeds, as in the case of tolls, or the rents and profits of an estate or franchise.⁸

In *Bloodgood v. Clark*, *supra*, Chancellor Walworth said that it was "almost a matter of course," upon a judgment creditor's bill, "to appoint a receiver to collect and preserve the property pending the litigation."

¹ Pub. Stats. ch. 105, § 42.

² Pub. Stats. ch. 118, § 110.

³ Pub. Stats. ch. 116, § 6.

⁴ Pub. Stats. ch. 119, § 14.

⁵ Pub. Stats. ch. 151, § 2, clause

7. [As a general rule, the courts will not appoint a receiver upon the application of a tenant in common against his co-tenants, except in a case of necessity: *Blood v. Blood*, 110 Mass. 545; *Vaughan v. Vincent*, 88 N. C. 116; *Parker v. Parker*, 82 N. C. 165; *Low v. Holmes*, 17 N. J. Eq. 148; *Williams v. Jenkins*, 11 Ga. 595; *Sandford v. Ballard*, 33 Beav. 401.]

⁶ [*Curling v. Marquis Townshend*, 19 Ves. 628; *Bloodgood v. Clark*, 4 Paige, 574. The plaintiff must have exhausted his remedies at law before seeking the aid of a court of equity: *Second Ward Bank v. Upmann*, 12 Wis. 499; *Parker*

v. Moore, 3 Ed. Ch. 234; *Thayer v. Swift*, Harr. (Mich.) 30. So, a general, and not a judgment creditor can have no relief: *Uhl v. Dillon*, 10 Md. 500; *Adee v. Bigler*, 81 N. Y. 349; *Smith v. Superior Court*, 97 Cal. 348; *McGoldrick v. Slevin*, 43 Ind. 522, 536; *May v. Greenhill*, 80 Ind. 124, 129; *Clark v. Raymond*, 84 Iowa, 251. See, also, *Buckley v. Baldwin*, 69 Miss. 804.]

⁷ *Bloodgood v. Clark*, 4 Paige, 574; [*Heard v. Murray*, 93 Ala. 127. See, also, *Doe v. Northwest Coal and Transportation Co.* 64 Fed. Rep. 928; *Sackhoff v. Vandegrift*, 98 Ala. 192. In *Lowell v. Doe*, 44 Minn. 144, the court appointed a receiver at the instance of a mortgagor.]

⁸ *Covington Drawbridge Co. v. Shepherd*, 21 How. 112.

Suits by and against Receivers.

1008. A receiver can neither sue¹ nor be sued, except by leave of the court which appointed him.²

But in *Paige v. Smith*,³ which was a suit against receivers appointed in Vermont, the court held that, since the Vermont court had decided that the same defendants could be sued as common carriers, the ordinary rule did not apply, and they could be sued in Massachusetts also, without leave of the Vermont court.

This immunity of a receiver against suit applies only so far as he is acting in pursuance of the authority of the court. If he is ordered to take possession of the property of a corporation, and he takes possession of what is not its property, he is not exempted from suit for this unwarranted taking.⁴ Thus in *Hills v. Parker*⁵ it was held that an action of replevin lay in behalf of the owner of a locomotive against the receivers of a railroad company who had taken possession of it as the property of the railroad.

The receiver of a railroad is liable, in his official capacity, for injuries caused by the negligence of his employees.⁶

¹ [Wynn v. Lord Newborough, 3 Bro. C. C. 88; Battle v. Davis, 66 N. C. 252.]

² [Barton v. Barbour, 104 U. S. 126; Comer v. Felton, 61 Fed. Rep. 731, 735; Rejall v. Greenhood, 60 Fed. Rep. 784; Chafee v. The Quidnick Co. 13 R. I. 442; Columbian Book Co. v. De Golyer, 115 Mass. 67; Field v. Jones, 11 Ga. 413; Wayne Pike Co. v. State, 134 Ind. 672; Martin v. Atchison, 2 Idaho, 590. The appointment of a receiver does not abate pending suits against the corporation: Kittridge v. Osgood, 161 Mass. 384. The act of March 3, 1887, 24 Stat. 552, ch. 373, as amended by the act of August 13, 1888, 25 Stat. 433, ch. 866, provides that every receiver appointed by a court of the United

States may be sued in respect of any act or transaction of his in carrying on the business connected with the property, without the previous leave of the court by which such receiver was appointed. See Texas & Pacific Ry. Co. v. Johnson, 151 U. S. 81, 101; Texas & Pacific Ry. Co. v. Cox, 145 U. S. 593; McNulta v. Lochridge, 141 U. S. 327; Central Trust Co. of New York v. East Tenn. &c. Ry. Co. 59 Fed. Rep. 523.]

³ 99 Mass. 395.

⁴ [In re Young, 7 Fed. Rep. 855.]

⁵ 111 Mass. 508.

⁶ Winbourn's Case, 30 Fed. Rep. 167; Blumenthal v. Brainerd, 38 Vt. 402, 408. High on Receivers, § 395; [Meara's Administrator v. Holbrook, 20 Ohio St. 137. In these

1009. As a general rule, and in the absence of any express statute or special order of the court, it is held that all suits at law to recover property or choses in action of the debtor, or other party for whom the receiver has been appointed, must be brought in the name of such party and not of the receiver.¹

1010. A receiver has no authority in any State or country other than that in which he was appointed, and his authority will not be recognized elsewhere.² He is incompetent to sue in a foreign jurisdiction, just as an executor or administrator appointed in one State has no authority to bring suit in any other. Some cases, however, have held to the contrary.³

Inasmuch as the receiver is an officer of the court, any unlawful interference with him in the performance of his duties, or in his possession of the property, is deemed a contempt of the court, and will be punished as such.⁴

cases, as in others, leave to sue must first be obtained: *Barton v. Barbour*, 104 U. S. 126. The judgment is of course *in rem*, — not against the receiver personally: *Davis v. Duncan*, 19 Fed. Rep. 477; *Brown v. Brown*, 71 Tex. 355; *Commonwealth v. Runk*, 26 Pa. St. 235.]

¹ [*Wilson v. Welch*, 157 Mass. 77; *Moriarty v. Kent*, 71 Ind. 601; *Yeager v. Wallace*, 44 Pa. St. 294; *Battle v. Davis*, 66 N. C. 252. *Contra*: *Baker v. Cooper*, 57 Me. 388; *Henning v. Raymond*, 35 Minn. 303.]

² *Booth v. Clark*, 17 How. 322, 330; *Hazard v. Durant*, 19 Fed. Rep. 471; *High on Receivers*, § 239; [*Filkins v. Nunnemacher*, 81 Wis. 91; *Farmers' & Merchants' Insurance Co. v. Needles*, 52 Mo. 17; *Carlin v. Wilcox Silver Plate Co.* 123 Ind. 477; *Winans v. Gibbs & Starrett Manuf. Co.* 48 Kans. 777. But the right of the receiver to sue has frequently been recognized as a

matter of comity: *Comstock v. Fredrickson*, 51 Minn. 350; *Bank v. McLeod*, 38 Ohio St. 174; *Bidlack v. Mason*, 26 N. J. Eq. 230; *Falk v. Janes*, 49 N. J. Eq. 484, 489; *High on Receivers*, § 241.]

³ *High on Receivers*, § 241.

⁴ *In re Higgins*, 27 Fed. Rep. 443; [*In re Tyler*, 149 U. S. 164, 181; *Beverley v. Brooke*, 4 Gratt. 187, 211; *Noe v. Gibson*, 7 Paige, 513; *Sercomb v. Catlin*, 128 Ill. 556; *Fidelity Trust, &c. Co. v. Mobile Street Ry. Co.* 53 Fed. Rep. 687. An interesting case, where a constable, acting under a state liquor law, attempted to seize a barrel of whiskey in the hands of a receiver, is *In re Swan*, 150 U. S. 637, 651. In *Helmores v. Smith*, L. R. 35 Ch. D. 449, the court punished the defendant for sending out a circular to the effect that the business which the receiver was carrying on had been abandoned. See, also, *Lane v. Sterne*, 3 Gif. 629; *Ames*

Issues of Fact.

1011. The general rule in chancery adopted by the Federal courts is, that the court may, upon its own motion or at the request of either party, send issues of fact to be tried by a jury.¹

In the Federal courts it is held that the verdict of the jury in such a case is not conclusive upon the judgment of the court, but is merely advisory. If the judge or chancellor is dissatisfied with it,—as, if he thinks it not in accordance with the weight of the evidence,—he may disregard it entirely.²

In the United States Supreme Court, on appeal, such verdicts are regarded as influential, but not as conclusive.³

1012. In Massachusetts it is provided by statute⁴ that the court may frame issues of fact “when requested by a party.” It is doubtful, therefore, whether the court can frame such issues of its own motion. Were there no statute upon the subject, the court would have this power; but the existence of the statute probably limits the power of the court

v. Trustees of Birkenhead Docks, 20 Beav. 332. Cases dealing with the rights and obligations of persons employed by receivers are: *Secor v. Toledo, Peoria, &c. Ry. Co.* 7 Biss. 513; *Frank v. Denver, &c. Ry. Co.* 23 Fed. Rep. 757.

There are some interesting cases, especially in the Federal Reports, upon the removal of receivers. In *Handy v. Cleveland & M. R. R. Co.* 31 Fed. Rep. 689, the receiver of a Western railroad corporation was removed because he had made an agreement with the Standard Oil Company to carry their oil at ten cents per barrel, and to charge everybody else thirty-five cents for a like service; and furthermore, to pay over the additional twenty-five cents per barrel collected from the competitors of the Standard Oil

Company to that company itself. In *Atkins v. Wabash, &c. Ry. Co.* 29 Fed. Rep. 161, 171, the receivers of a railroad corporation were removed partly on the ground that they had sold their own coal to the corporation at a rate suspiciously high, and had carried it in the cars of the corporation at a rate suspiciously low.]

¹ *Field v. Holland*, 6 Cranch, 8; *Gray v. Halkyard*, 28 Fed. Rep. 854.

² *Quinby v. Conlan*, 104 U. S. 420; *Basey v. Gallagher*, 20 Wall. 670; *Idaho & Oregon Land Co. v. Bradbury*, 132 U. S. 509, 516.

³ *Garsed v. Beall*, 92 U. S. 684, 695; *Quinby v. Conlan*, *supra*.

⁴ Pub. Stats. ch. 151, § 27. [This law was changed slightly by Acts of 1895, ch. 116.]

to the contingency specified in the statute, *i. e.* "when requested by a party." The exercise of this power is a matter of discretion with the court. The judge, though requested to do so, is not bound to send issues of fact to a jury unless he sees fit. But, nevertheless, under the Massachusetts law, the decision of a single judge upon the matter is subject to appeal, this being one of the few cases where an appeal is allowed in regard to a matter of discretion.¹

In Massachusetts the verdict upon the issue is binding upon the court and conclusive, unless it is set aside by the court.²

Under the Constitution of the United States, no one has the right to a trial by jury in a proper chancery suit, — that is to say, in a suit which was within the original chancery jurisdiction. But in respect to those matters where the chancery jurisdiction has been created by statute since the founding of our government, the constitutional right to a trial by jury still obtains.³

Decrees.

1013. A decree is the judgment and order of the court upon the issue presented to and heard by it.⁴

Decrees may be interlocutory or final.⁵ A final decree is the one which terminates the suit, and conclusively fixes the rights of the parties thereto.⁶ Interlocutory decrees are all decrees passed in the progress of the cause before the final decree.

In every contested suit, one or more interlocutory decrees are commonly necessary. The decision of any intermediate question, short of the final decree, is by an interlocutory order or decree, these terms being synonymous. An order granting a temporary injunction; a decree establishing the plaintiff's title and directing the defendant to account; a refer-

¹ Stockbridge Iron Co. v. Hudson Iron Co. 102 Mass. 45; Rose v. New England Insurance Co. 120 Mass. 113.

² Franklin v. Greene, 2 Allen, 519.

³ [*Supra*, p. 8.]

⁴ [2 Daniell's Ch. Pr. 986.]

⁵ [Richmond v. Atwood, 52 Fed. Rep. 10.]

⁶ [Lewisburg Bank v. Sheffey, 140 U. S. 445; Forbes v. Tuckerman, 115 Mass. 115, 119; Gerrish v. Black, 109 Mass. 474.]

ence of the case to a master, — these are all interlocutory decrees, although in effect they may be decisive, in great measure, of the matters at issue.

Until a final decree has been entered, all interlocutory orders and decrees are subject to revision and amendment, or reversal, at the discretion of the court.

When nothing more remains to be done to ascertain the rights of the parties in litigation, or to fix the amount to be recovered, then a final decree is entered. This decree sets forth briefly but specifically the final judgment and award of the court upon the matters at issue. It is not confined to a simple statement that the court decrees for the plaintiff, or for the defendant. For example, in case of a bill to enforce an agreement to convey land, the decree, if in favor of the plaintiff, recites that the defendant did execute the agreement, or other instrument, as set forth in the bill; that the plaintiff duly tendered the purchase-money and is entitled to a conveyance; and the decree orders that the defendant execute and deliver to the plaintiff, on or before a day named, a good and sufficient warranty deed of the premises.

1014. It is one of the peculiarities and advantages of a court of chancery that in framing its decrees it is not bound by any inflexible or arbitrary rules, but can always adapt them to meet the equities of the particular case. At law the judgment must be either for the plaintiff or for the defendant. But if, in the opinion of a court of equity, either party, before having an ultimate decision in his favor, is bound to do something which he has not done, the court can so direct, and it can make its decree, in favor either of the plaintiff or the defendant, conditional upon the performance of the act which, as the court finds, justice requires.

Notice by telegram of a decree or other order of court may be sufficient if clearly proved.¹

DECREE FOR DEFENDANT. — When the decree is for the defendant, after reciting that the case has been heard, etc., the order commonly directs that the bill be dismissed, usually with costs for the defendant.

¹ *Ex parte Langley*, L. R. 13 Ch. D. 110.

Bill dismissed without Prejudice.

1015. Often a bill is dismissed for reasons aside from the merits of the case,—because, for instance, the necessary parties are not before the court, or because the plaintiff's remedy is at law. In these and similar instances when the case is disposed of without an adjudication upon its merits, the rule is to dismiss the bill “without prejudice.” The meaning of this phrase is, that the dismissal shall not be a bar to, and shall not prejudice, the plaintiff's right to bring another proper bill, or to maintain a suit at law for the same cause of action, as the case may be.¹ Without this qualification, a final decree, whether for plaintiff or for defendant, after a hearing upon the merits, is a bar to any subsequent suit between the same parties, either at law or in equity, for the same subject-matter.

When the record reads “Bill dismissed,” without any qualification, and nothing more appears, it is conclusively presumed that the decree was passed after a hearing upon the merits, and that it was a final determination of the controversy.² In *Lyon v. Perin & Gaff Company*,³ the record was to the effect that, the cause having been submitted upon bill, answer, and replication, and having been duly considered, the court “adjudges and decrees that the equities are with the defendant,” and dismissed the bill. It was held that this decree was conclusive, and that in a subsequent suit between the same parties upon the same subject-matter, the plaintiff could not show by the clerk of the court that no proofs were taken, and that the decree was made in his absence.

But when the record itself shows that no hearing was had, and therefore that no decision upon the merits was made,—as where the record states that the complainant failed to appear, or that the bill was dismissed upon his own motion,

¹ [Richards v. Allis, 82 Wis. 509; Fed. Rep. 29; Richards v. Allis, 82 Magill v. Mercantile Trust Co. 81 Wis. 509; 1 Daniell's Ch. Pr. 6th Ky. 129; Weigley v. Coffman, 144 (Amer.) ed. 659. See, also, Jones Pa. St. 489, 497.] v. Turner, 81 Va. 709.]

² [Foote v. Gibbs, 1 Gray, 412; ³ 125 U. S. 698.
Union Pacific Ry. v. Harmon, 54

—a decree of “Bill dismissed,” although without qualification, is not a bar to another suit.¹ As a matter of good practice, however, the entry in such cases should always be “without prejudice.”

1016. A plaintiff may ordinarily dismiss his bill, at any time before final hearing, upon payment of costs.² But if any decree or order has been passed affecting the rights of the defendant, he cannot do so.³

Costs.

1017. There is no particular in which the power of a court of chancery to adopt its orders to the justice of the case is more conspicuous than in the matter of costs. At law, as a general rule, the costs go to the prevailing party. The rule is inflexible. But courts of chancery have full authority to order or withhold costs at their discretion, according to their view of what is just in each particular case.⁴

Undoubtedly, as a general rule, equity gives costs to the prevailing party, but this does not follow as a matter of course. If either party has been guilty of any unfairness or sharpness, or if the plaintiff's claim, although one which a court of equity must enforce, is still, under the circumstances, a harsh or oppressive one as against the defendant, the court

¹ *Badger v. Badger*, 1 Cliff. 237.

² *Kempton v. Burgess*, 136 Mass. 192. In *Connecticut & P. R. R. Co. v. Hendee*, 27 Fed. Rep. 678, the complainant was permitted to have his bill dismissed, although the defendant had taken and filed testimony. [*Western Union Telegraph Co. v. American Bell Telephone Co.* 50 Fed. Rep. 662; *Evans v. Sheldon*, 69 Ga. 100, 110.]

³ *Chicago & Alton R. R. Co. v. Union Rolling Mill*, 109 U. S. 702, 713; [*Moriarty v. Mason*, 47 Conn. 436. In *Hat-Sweat Manuf. Co. v. Waring*, 46 Fed. Rep. 87, the plain-

tiffs were refused permission to dismiss the bill after the answer was filed, and before testimony was taken, on the ground that the defendants would be entitled to a decree in their favor if the allegations of the answer were established.]

⁴ [*Hammersley v. Barker*, 2 Paige, 372, 373; *Herrington v. Robertson*, 71 N. Y. 280, 284; *Morris v. Peckham*, 51 Conn. 128, 134; *Central Trust Co. v. Central Iowa Ry. Co.* 38 Fed. Rep. 889; *Miller v. Clark*, 52 Fed. Rep. 900, 902; *United States v. Southern Pacific Ry. Co.* 56 Fed. Rep. 865.]

may, and often does, withhold costs.¹ Costs must specifically be decreed, else they are not recoverable.²

1018. COSTS OUT OF A FUND. — When the title to an estate or fund is at issue before the court, and the several claimants are chargeable with no fault or negligence, the court will commonly order not only the taxable costs but the reasonable counsel fees of the parties, to be paid out of the fund or estate. In other words, it will order costs to be paid “as between solicitor and client.”³

Familiar instances of this practice are where a testator has bequeathed a fund to some charitable society, but the designation in the will is so uncertain that the fund is claimed, not improperly, by several societies; or where, owing to the obscurity of a will or deed, a trustee has been obliged to apply to the court for instructions, there being several opposing claimants of the same fund;⁴ or where, under similar circumstances, a bill of interpleader by a trustee is necessary.⁵ In general, the costs of all parties to a proper bill of interpleader are allowed.⁶

¹ [Sapp v. Phelps, 92 Ill. 588; U. S. 527, the court animadverted Graves v. Wood, 40 N. J. Eq. 65; upon the custom of allowing extravagant fees and commissions, and Crawford v. Osman, 90 Mich. 77; Righter v. Stall, 3 Sandf. Ch. 608; especially remuneration for the Johnson v. Garrett, 16 N. J. Eq. 31; Young v. Thomas, [1892] 2 Ch. 134. In some cases costs are

awarded to the losing party: Norman v. Johnson, 29 Beav. 77; Robinson v. Cropsey, 2 Edw. Ch. 138, 148; Third National Bank v. Cary, 39 N. J. Eq. 25. See, also, 2 Beach's Modern Equity Practice, §§ 1011, 1012; 2 Daniell's Ch. Pr. 1381, *et seq.*

⁴ [Moore v. Alden, 80 Me. 301; Morgan v. Huggins, 48 Fed. Rep. 3. But see Gayle v. Johnson, 80 Ala. 388; Kimball v. Bible Society, 65 N. H. 139.]

⁵ [Spring v. The South Carolina Insurance Co. 8 Wheat. 268; Aymer v. Gault, 2 Paige, 284.]

⁶ Bliss v. The American Bible Society, 2 Allen, 334; Bowditch v. Saltyk, 99 Mass. 136; Esty v. Clark, 101 Mass. 36; Towle v. Swasey, 106 Mass. 100; Morse v. Stearns, 131 Mass. 389. In Cobb v. Rice, 130 Mass. 231, a bill of interpleader, costs were refused to the defendants because “the only cause of the suit is their unjust claim to property

² [Conable v. Bucklin, 2 Aik. (Vt.) 221; Stone v. Locke, 48 Me. 425. See, also, Phelps v. Wood, 46 How. Pr. 1.]

³ [Buchanan v. Lloyd, 64 Md. 306; Cox v. Wills, 49 N. J. Eq. 573; 2 Daniell's Ch. Pr. 1411. See also *In re* Blundell, L. R. 40 Ch. D. 370. In Trustees v. Greenough, 105

is their unjust claim to property

Rehearing.

1019. When a final decree has been entered, there are two possible modes of reopening it. The first is a petition for a rehearing, provided that the petition is filed during the term at which the final decree was passed.¹ It is in effect a motion for a new trial.² This remedy is applicable not only to final decrees, but also to interlocutory decrees. When an interlocutory decree has been rendered which settles the merits of a case, or of a substantial part of it, the petition should be presented without delay and before final decree. Unnecessary delay is fatal.

The petition should set forth very distinctly in what respects the decree is believed to be erroneous, and the precise points upon which the party wishes to be reheard.³

If the ground of the petition is some newly discovered, material fact, the petition should be filed immediately upon the discovery of the new fact or evidence.⁴

1020. Until the expiration of the term, all decrees made during the term, whether interlocutory or final, are still within the control of the court, and may be opened and amended or reversed upon petition for rehearing.⁵

By the Rules of the United States Supreme Court, "a petition for rehearing after judgment can be presented only at the term at which judgment is entered, unless by special leave granted during the term, . . . and will not be granted or permitted to be argued, unless a justice who concurred

which is not theirs." In *Bogle v. Bogle*, 3 Allen, 158, costs were refused to a delinquent trustee upon a bill to obtain his discharge from the trust. In *Dyer v. Shurtleff*, 112 Mass. 165, 170, a bill to redeem mortgaged property, costs were refused to both parties on appeal.

¹ [The granting of such a petition is discretionary with the court. *Daniel v. Mitchell*, 1 Story's Rep. 198; *The New Jersey Zinc Co. v. The New Jersey Franklinite Co.* 14 N. J. Eq. 308; *Read v. Patterson*, 44 N. J. Eq. 211.]

² [*Roemer v. Bernheim*, 132 U. S. 103, 106; *Giant Powder Co. v. California Vigorit Powder Co.* 5 Fed. Rep. 197, 201.]

³ [*Wiser v. Blachly*, 2 Johns. Ch. 488.]

⁴ [*Norton v. Walsh*, 49 Fed. Rep. 769.]

⁵ [*Bronson v. Schulten*, 104 U. S. 410; *Henderson v. Carbondale Coal & Coke Co.* 140 U. S. 25.]

in the judgment desires it and a majority of the court so determine.”¹

But if the term of the court at which the final decree was passed has expired, then the only mode of securing a rehearing is by a bill of review,² and that has fully been considered already.

By Rules of Practice in Equity in the United States Courts, if no appeal lies to the Supreme Court, the petition for rehearing “may be admitted at any time before the end of the next term of the court, in the discretion of the court.”³

In this attempt to reopen the case by a bill of review, the final struggle has been made, the resources even of a court of equity are exhausted, and the cause comes to an end.

¹ Rule No. 30. [In the following cases the facts were held not sufficient to justify a rehearing: *Allen v. Woonsocket Co.* 13 R. I. 146; *Torrent v. Dnluth Lumber Co.* 32 Fed. Rep. 229; *McDowell v. Perrine*, 36 N. J. Eq. 632; *Dennett v. Dennett*, 44 N. H. 531; *Dunham v. Winans*, 2 Paige, 24; *Woodside v. Morgan*, 92 Ill. 273; *Rishel v. Crouse*, 162 Pa. St. 3.]

² *Roemer v. Simon*, 91 U. S. 149; [*Brooks v. Railroad Co.* 102 U. S. 107; *Hodge v. Davis*, 4 Hen. & M. (Va.) 400; *Armstrong v. Wilson*, 19 W. Va. 108; *Ex parte Robinson*, 72 Ala. 389; *United Lines Telegraph Co. v. Stevens*, 67 Md. 156.]

³ Rule No. 88.

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